

**From:** [Kelly, Lynn](#)  
**To:** [McDermott, Marna](#)  
**Subject:** FW: CEI v. EPA, 13-0779 (BAH)  
**Date:** Tuesday, August 06, 2013 10:57:00 AM

---

**Additional context.**

Lynn Kelly | US EPA | Office of General Counsel | 1200 Pennsylvania Ave., NW | ARN, Mail Code 2377A  
| Washington DC 20460 | phone: (202) 564-3266

The contents of this e-mail and any attachments to it may contain deliberative-process, attorney-client, attorney work product, or otherwise privileged material. If you are not the intended recipient, or believe you have received this communication in error, please delete the copy you received, and do not print, copy, retransmit, disseminate, or otherwise use the information. Thank you.

---

**From:** Kelly, Lynn  
**Sent:** Friday, August 02, 2013 1:14 PM  
**To:** Minoli, Kevin  
**Cc:** Miller, Kevin  
**Subject:** FW: CEI v. EPA, 13-0779 (BAH)

Kevin,

Here was Nancy's response. (b) (5) DPP, (b) (5) ACP

[REDACTED]

Lynn Kelly | US EPA | Office of General Counsel | 1200 Pennsylvania Ave., NW | ARN, Mail Code 2377A  
| Washington DC 20460 | phone: (202) 564-3266

The contents of this e-mail and any attachments to it may contain deliberative-process, attorney-client, attorney work product, or otherwise privileged material. If you are not the intended recipient, or believe you have received this communication in error, please delete the copy you received, and do not print, copy, retransmit, disseminate, or otherwise use the information. Thank you.

---

**From:** Ketcham-Colwill, Nancy  
**Sent:** Friday, August 02, 2013 1:07 PM  
**To:** Kelly, Lynn  
**Cc:** Miller, Kevin  
**Subject:** RE: CEI v. EPA, 13-0779 (BAH)

(b) (5) DPP, (b) (5) ACP

[REDACTED]

[REDACTED]

A: (b) (5) DPP, (b) (5) ACP

[REDACTED]  
 [REDACTED]  
 [REDACTED]

\_\_\_\_\_

[REDACTED]  
 [REDACTED]  
 [REDACTED]  
 [REDACTED]

[illegible]

[REDACTED]

[REDACTED]

**From:** Kelly, Lynn  
**Sent:** Friday, August 02, 2013 10:34 AM  
**To:** Ketcham-Colwill, Nancy  
**Cc:** Miller, Kevin  
**Subject:** FW: CEI v. EPA, 13-0779 (BAH)

Nancy,

Kevin left you a voicemail a few minutes ago related to this email. As you can see generally from the string below, our AUSA has been negotiating with CEI to secure withdrawal of the FOIA litigation over texts sent from Gina's work-issued devices. This (b) (5) DPP, (b) (5) ACP, (b) (5) AWP

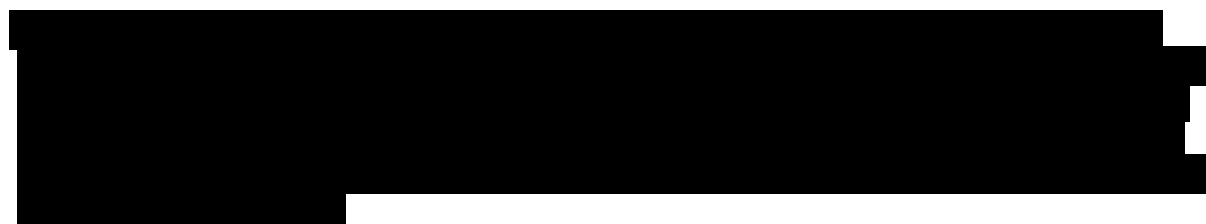
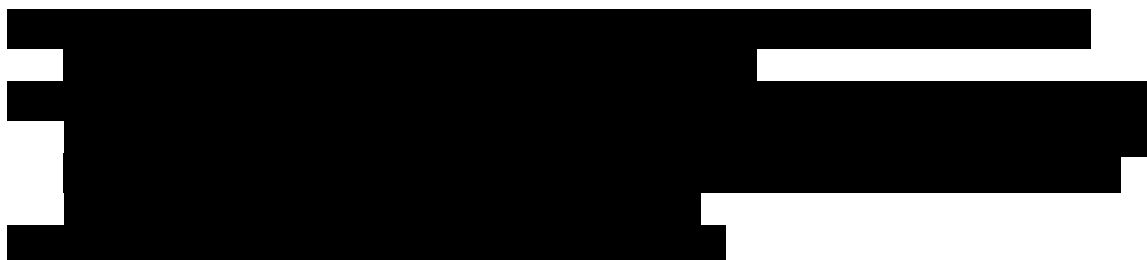

\_\_\_\_\_

\_\_\_\_\_

As a reminder, our last statements we sent to them was:

**The Agency did not locate any text messages responsive to your FOIA request at issue in this case. Moreover and in any event, Ms. McCarthy uses text messaging to communicate with her family. Ms. McCarthy uses email for government business, and text messaging for family and other personal business. These personal text messages are unrelated to Agency business, and thus were not required to be preserved by the Agency."**

(b) (5) DPP, (b) (5) ACP, (b) (5) AWP



Thanks,

Lynn Kelly | US EPA | Office of General Counsel | 1200 Pennsylvania Ave., NW | ARN, Mail Code 2377A  
| Washington DC 20460 | phone: (202) 564-3266

The contents of this e-mail and any attachments to it may contain deliberative-process, attorney-client, attorney work product, or otherwise privileged material. If you are not the intended recipient, or believe you have received this communication in error, please delete the copy you received, and do not print, copy, retransmit, disseminate, or otherwise use the information. Thank you.

---

**From:** Lo, Michelle (USADC) [<mailto:Michelle.Lo2@usdoj.gov>]

**Sent:** Friday, August 02, 2013 9:36 AM

**To:** Kelly, Lynn

**Subject:** FW: CEI v. EPA, 13-0779 (BAH)

**From:** [chornerlaw@aol.com](mailto:chornerlaw@aol.com) [<mailto:chornerlaw@aol.com>]  
**Sent:** Thursday, August 01, 2013 10:05 PM  
**To:** Lo, Michelle (USADC); [hbader@cei.org](mailto:hbader@cei.org)  
**Cc:** [skazman@cei.org](mailto:skazman@cei.org)  
**Subject:** RE: CEI v. EPA, 13-0779 (BAH)

Dear Michelle,

Rather than endless rounds of clarification, though we have only sought one clear statement, I \*think\* you may just clarified the ambiguity as explained below. But if you plainly state what is implied we can dismiss.

Below you more strongly imply what seemed the implication before, but is still not stated outright with no room for misunderstanding. **That is that Ms. McCarthy \*only\* used the texting function on her EPA phone for personal messages; and because she never used it for work this is why EPA has preserved none of her texts.**

If that is what you were saying, would you please confirm that and that this is also EPA's position. In that case, you need not take any further questions to EPA and I accept the 'no records' response as sufficient such that we will dismiss.

I look forward to your reply.

Best,  
Chris

Sent from my Verizon Wireless 4G LTE smartphone

"Lo, Michelle (USADC)" wrote:

Chris,

I will take your request back to the agency, but I would like to be clear in what I will be communicating to the agency. The Agency has already explained that Ms. McCarthy uses text messaging for family and other personal business, not government business and that, because personal text messages are unrelated to Agency business, they were not required to be preserved by the Agency. I am not sure how you read this statement to mean that Ms. McCarthy uses the texting function for EPA business. As I explained to Hans, this FOIA request deals with text messages on 18 specific dates, and we have already provided a very clear explanation for the "no records" response.

If what you are asking is – did Ms. McCarthy send ever any text messages that were work-related – I can ask the EPA if it would be willing to respond to this question even though it is well outside the scope of the FOIA request and does not alter the fact that the EPA did not locate any text messages on the 18 specific dates. If the EPA is willing to respond to the question of whether Ms. McCarthy



ever sent any text messages that were work-related, can you represent that you will dismiss this case? As much as I think briefing would be an unnecessary use of the Court's and the parties' resources, it may be that we end up having to brief this matter rather than engage in endless rounds of clarification.

Best,  
Michelle

**From:** Chris Horner [<mailto:chornerlaw@aol.com>]  
**Sent:** Thursday, August 01, 2013 6:41 PM  
**To:** [HBader@cei.org](mailto:HBader@cei.org); Lo, Michelle (USADC)  
**Cc:** [SKazman@cei.org](mailto:SKazman@cei.org)  
**Subject:** Re: CEI v. EPA, 13-0779 (BAH)

Dera Michelle,

Please consider the following, in addition to what Hans has written you.

EPA's obligation is to *demonstrate* 'no records'. So far they have stated it. Demonstration is found in the bills for her device.

We have obtained what EPA claims to be the relevant (texting) portions of those bills, showing extensive texting activity, so extensive that it is thoroughly implausible that Ms. McCarthy didn't text on those dates.

After we calculated the probability (1 in 7.9 sextillion), we received your statement on EPA's behalf including the portion that is the basis for the ambiguity that Hans refers to and under which we cannot dismiss, but possibly can if you clarify what it is saying:

Ms. McCarthy uses text messaging to communicate with her family. Ms. McCarthy uses email for government business, and text messaging for family and other personal business. These personal text messages are unrelated to Agency business, and thus were not required to be preserved by the Agency.

To me this plainly implied that EPA's position is that Ms. McCarthy uses email for work and the text messaging function *only* for personal messages, and therefore EPA has not preserved her text messaging. If that is the case, and EPA state it, then the 'no records' response is sufficient and we can, I believe, dismiss.

However, another of us suggested that in context it implies something materially different, that while Ms. McCarthy uses the texting function for EPA business, on the 18 dates at issue in this matter all texts sent or received by Ms. McCarthy were personal, which is why those specific text messages are not preserved. We have not had our stats people run the probability of that but I suggest it is for all practical purposes the same as the idea that she did not text on those 18 dates.

Regardless, it may imply both but we cannot reasonably discern which, and so we ask you to state which is EPA's assertion. This is material because of EPA's obligation to demonstrate, and the sole (and most reasonable) demonstration -- her phone bills -- indicating that one of these readings is implausible, and under that reading therefore so is the 'no records' claim. The other reading is more plausible and makes the 'no records' response plausible.

So, we simply would like clarification of the ambiguous statement: over the period in question, did EPA preserve some of Ms. McCarthy's text messages -- those that someone determined were work-related -- or did they preserve none of them because they were all personal?

If we have a clear answer to this then depending on that clarification we can possibly dismiss, or we know we cannot justify doing so. We also cannot justify doing so in the absence of a clarification of an ambiguous assertion. Clarifying it is of course much simpler than further litigating this if that clarification would enable

resolution and dismissal.

But as such, we need it to be a formal representation, in writing.

We look forward to your response.

Best,  
Chris Horner

\*\*\*\*\*

The information contained in this message may be privileged. This transmission is therefore intended by the sender to be confidential and intended only for the proper recipient. If you are not the intended recipient distribution of this message is prohibited.

-----Original Message-----

From: Hans Bader <[HBader@cei.org](mailto:HBader@cei.org)>  
To: Lo, Michelle (USADC) (USADC) <[Michelle.Lo2@usdoj.gov](mailto:Michelle.Lo2@usdoj.gov)>  
Cc: Sam Kazman <[SKazman@cei.org](mailto:SKazman@cei.org)>; Chris Horner <[chornerlaw@aol.com](mailto:chornerlaw@aol.com)>  
Sent: Thu, Aug 1, 2013 11:30 am  
Subject: RE: CEI v. EPA, 13-0779 (BAH)

I should note that we have no objection to the proposed briefing schedule you suggested

(EPA's Motion for Summary Judgment  
CEI's Opposition to EPA's Motion for Summary Judgment  
EPA's Reply  
2013).

September 16, 2013  
October 16, 2013  
November 6,

But, hopefully, we can tie up the loose ends described below in my earlier email, and moot the need for any summary judgment motion (by resolving the case before then).

I will call you in a few minutes to try to get these things squared away.

Thanks,

Hans Bader  
CEI

---

**From:** Hans Bader  
**Sent:** Wednesday, July 31, 2013 8:25 PM  
**To:** 'Lo, Michelle (USADC)'  
**Cc:** Sam Kazman; Chris Horner  
**Subject:** RE: CEI v. EPA, 13-0779 (BAH)

You are correct that I am only seeking the text messages for 18 specific dates, not the text messages in general. The reason I am asking about the text messages not being preserved in general over that period (July 9, 2009 to June 29, 2012) is just to confirm the apparent reason why the text messages don't exist for those 18 dates. Once this is understood, the query makes sense, to clarify matters and eliminate any ambiguities.

Thanks,

Hans

---

**From:** Lo, Michelle (USADC) [<mailto:Michelle.Lo2@usdoj.gov>]

**Sent:** Wednesday, July 31, 2013 6:19 PM  
**To:** Hans Bader  
**Cc:** Sam Kazman; Chris Horner  
**Subject:** RE: CEI v. EPA, 13-0779 (BAH)

Dear Hans,

As I stated below and as reflected in the EPA's answer to the complaint, the Agency did not locate any text messages for the 18 dates specified by your FOIA request. As for your question about the preservation of Ms. McCarthy's text messages in general, we are now going well beyond the scope of this FOIA litigation, and I do not believe this is the appropriate forum to address this question.

Thanks,  
Michelle

---

**From:** Hans Bader [<mailto:HBader@cei.org>]  
**Sent:** Wednesday, July 31, 2013 4:08 PM  
**To:** Lo, Michelle (USADC)  
**Cc:** Sam Kazman; Chris Horner  
**Subject:** RE: CEI v. EPA, 13-0779 (BAH)

Thanks for the clarifying details. Does this mean that her text messages in general weren't preserved, or just that the agency didn't locate any such messages for the 18 dates specified by the FOIA request? (Just tying up loose ends.)

Thanks,

Hans

---

**From:** Lo, Michelle (USADC) [<mailto:Michelle.Lo2@usdoj.gov>]  
**Sent:** Wednesday, July 31, 2013 3:42 PM  
**To:** Hans Bader  
**Cc:** Sam Kazman; Chris Horner  
**Subject:** RE: CEI v. EPA, 13-0779 (BAH)

Dear Hans,

Thank you for the call just now. To summarize our discussion, I've inquired with the EPA about your question below, and EPA has explained that the Agency did not locate any text messages responsive to your FOIA request at issue in this case. Moreover and in any event, Ms. McCarthy uses text messaging to communicate with her family. Ms. McCarthy uses email for government business, and text messaging for family and other personal business. These personal text messages are unrelated to Agency business, and thus were not required to be preserved by the Agency.

It's my understanding that you will be filing a stipulation of dismissal in this case. I do have one edit, which is to add "with each party to bear its own costs and fees" to the end of the stipulation. I have also made a formatting change to the signature block since my telephone number is changing. If these changes are acceptable to you, you are authorized to file the stipulation on behalf of the parties.

Thanks,  
Michelle

Michelle Lo  
Assistant United States Attorney  
Civil Division  
555 4th Street, N.W.

Washington, D.C. 20530  
(202) 252-2541 – ***Please note new number***  
(202) 514-8780 fax  
[Michelle.Lo2@usdoj.gov](mailto:Michelle.Lo2@usdoj.gov)

---

**From:** Hans Bader [<mailto:HBader@cei.org>]  
**Sent:** Monday, July 29, 2013 3:02 PM  
**To:** Lo, Michelle (USADC)  
**Cc:** Sam Kazman; Chris Horner  
**Subject:** RE: CEI v. EPA, 13-0779 (BAH)

One final thing: My colleagues are curious and want an answer to the following question before we dismiss the case: How can there be no responsive records (as stated by EPA in its no-records response, and echoed in the answer), that is, no text messages, when EPA has elsewhere produced documents to us saying that Ms. McCarthy sent hundreds of text messages using her EPA device (see the attached administrative response by EPA to Chris Horner's FOIA request – the first attached file is EPA's cover letter in response to that request, and the second is its substantive response)? I'd like to get that clarification on that issue before filing the stipulation I sent earlier.

Thanks,

Hans Bader  
CEI

---

**From:** Hans Bader  
**Sent:** Monday, July 29, 2013 12:17 PM  
**To:** 'Lo, Michelle (USADC)'  
**Cc:** Sam Kazman  
**Subject:** RE: CEI v. EPA, 13-0779 (BAH)

Oops. The draft stipulation I sent in the below email had the wrong docket number on it. That has been fixed in the attached draft stipulation.

---

**From:** Hans Bader  
**Sent:** Monday, July 29, 2013 12:11 PM  
**To:** 'Lo, Michelle (USADC)'  
**Cc:** Sam Kazman  
**Subject:** RE: CEI v. EPA, 13-0779 (BAH)

Chris Horner remains very skeptical of the no-records response. Nevertheless, it seems to me that it may not be worth the candle to keep litigating this particular case, as a prudential matter.

Accordingly, plaintiff would be willing to file the attached stipulation of dismissal. If this is acceptable to you, then it can be filed with the court, and it will not be necessary to set a briefing schedule.

Sorry for the delay in responding.

Thank you.

Hans Bader  
Competitive Enterprise Institute  
(202) 331-2278  
[hbader@cei.org](mailto:hbader@cei.org)

---

**From:** Lo, Michelle (USADC) [<mailto:Michelle.Lo2@usdoj.gov>]  
**Sent:** Monday, July 29, 2013 10:11 AM  
**To:** Hans Bader  
**Subject:** RE: CEI v. EPA, 13-0779 (BAH)

Dear Hans:

Per Judge Howell's Standing Order, the parties are to jointly prepare and submit a report indicating whether the agency has made a final determination on compliance with the FOIA request at issue and propose a schedule for the filing of dispositive motions within 14 days after any defendant appears, or by this Friday, August 2. As you know, the EPA issued a "no records" response to CEI's FOIA request on May 31, 2013. Provided CEI intends to proceed with this litigation, we propose the following briefing schedule:

EPA's Motion for Summary Judgment	September 16, 2013
CEI's Opposition to EPA's Motion for Summary Judgment	October 16, 2013
EPA's Reply	November 6, 2013

Please let me know if the above proposal is agreeable to you. Thank you.

Michelle Lo  
Assistant United States Attorney  
Civil Division  
555 4th Street, N.W.  
Washington, D.C. 20530  
(202) 252-2541 – **Please note new number**  
(202) 514-8780 fax  
[Michelle.Lo2@usdoj.gov](mailto:Michelle.Lo2@usdoj.gov)

---

**From:** Hans Bader [<mailto:HBader@cei.org>]  
**Sent:** Wednesday, July 17, 2013 6:06 PM  
**To:** Lo, Michelle (USADC)  
**Subject:** RE: CEI v. EPA, 13-0779 (BAH)

I am still waiting to hear back. Sorry about the delay.

---

**From:** Lo, Michelle (USADC) [<mailto:Michelle.Lo2@usdoj.gov>]  
**Sent:** Wednesday, July 17, 2013 6:00 PM  
**To:** Hans Bader  
**Subject:** RE: CEI v. EPA, 13-0779 (BAH)

Hans:

Have you had a chance to discuss with your colleagues whether CEI intends to move forward with this litigation in light of the EPA's no records response?

Thanks,  
Michelle

---

**From:** Lo, Michelle (USADC)  
**Sent:** Thursday, July 11, 2013 4:12 PM  
**To:** Hans Bader <[HBader@cei.org](mailto:HBader@cei.org)> ([HBader@cei.org](mailto:HBader@cei.org))  
**Subject:** CEI v. EPA, 13-0779 (BAH)

Hans:

Attached is the EPA's response to CEI's FOIA request for "copies of all text messages sent by Assistant Administrator for Air and Radiation Gina McCarthy on a mobile telephone provided for her use by the Agency" that I was referring to on our call just now. Please let me know if CEI believes that further litigation of this case will be necessary in light of the EPA's no records response. Thank you.

<< File: Final Response 6005.pdf >>

Michelle Lo  
Assistant United States Attorney  
Civil Division  
555 4th Street, N.W.  
Washington, D.C. 20530  
(202) 514-5134; (202) 514-8780 fax  
[Michelle.Lo2@usdoj.gov](mailto:Michelle.Lo2@usdoj.gov)

**From:** [McDermott, Marna](#)  
**To:** [Smith, Kristi](#)  
**Subject:** FW: Case dismissed pursuant to stipulation you sent Tuesday RE: CEI v. EPA, 13-0779 (BAH)  
**Date:** Friday, September 13, 2013 4:14:00 PM  
**Attachments:** [CEI v EPA No 13-779 Stipulation of Dismissal FILED.pdf](#)

---

Marna McDermott  
Associate Deputy General Counsel  
U.S. Environmental Protection Agency  
(202) 564-2890

-----Original Message-----

From: Kelly, Lynn  
Sent: Friday, September 13, 2013 12:28 PM  
To: Minoli, Kevin; Miller, Kevin  
Cc: McDermott, Marna; Albright, Scott  
Subject: FW: Case dismissed pursuant to stipulation you sent Tuesday RE: CEI v. EPA, 13-0779 (BAH)

FYI (b) (5) DPP, (b) (5) ACP, (b) (5) AWP  
[REDACTED]  
[REDACTED]  
[REDACTED]

Lynn Kelly | US EPA | Office of General Counsel | 1200 Pennsylvania Ave., NW | WJC North, Mail Code 2377A | Washington DC 20460 | phone: (202) 564-3266 The contents of this e-mail and any attachments to it may contain deliberative-process, attorney-client, attorney work product, or otherwise privileged material. If you are not the intended recipient, or believe you have received this communication in error, please delete the copy you received, and do not print, copy, retransmit, disseminate, or otherwise use the information. Thank you.

-----Original Message-----

From: Lo, Michelle (USADC) [<mailto:Michelle.Lo2@usdoj.gov>]  
Sent: Friday, September 13, 2013 12:13 PM  
To: Kelly, Lynn  
Subject: FW: Case dismissed pursuant to stipulation you sent Tuesday RE: CEI v. EPA, 13-0779 (BAH)

Lynn: Please see the attached stipulation of dismissal that was filed just now. (b) (5) DPP, (b) (5) ACP, (b) (5) AWP  
[REDACTED]

1. Thanks.

-----Original Message-----

From: Hans Bader [<mailto:HBader@cei.org>]  
Sent: Friday, September 13, 2013 11:21 AM  
To: Lo, Michelle (USADC)  
Cc: Chris Horner; Sam Kazman  
Subject: Case dismissed pursuant to stipulation you sent Tuesday RE: CEI v. EPA, 13-0779 (BAH)

OK. I have filed the stipulation you drafted and sent on Tuesday. It is attached.

(I changed the dates from September 10 to September 13 as in the certificate of service, but otherwise, it is exactly as you sent it).

Have a nice weekend.

-----Original Message-----

From: Lo, Michelle (USADC) [<mailto:Michelle.Lo2@usdoj.gov>]

Sent: Thursday, September 12, 2013 5:50 PM

To: Hans Bader

Cc: Chris Horner; Sam Kazman

Subject: Re: CEI v. EPA, 13-0779 (BAH)

I am glad that we have been able to have productive discussions to resolve this matter, and I look forward to continuing our amicable relationship in any future cases. However, this is not the first time that I have understood the parties to have reached an agreement on the terms of the dismissal, only to learn of another change that you require. I think this should be a straightforward dismissal; the publicly filed answer already explains the no records response, so I do not believe the additional sentence is necessary. I am available to discuss if you would like.

On Sep 12, 2013, at 5:10 PM, "Hans Bader"  
<[HBader@cei.org](mailto:HBader@cei.org)<<mailto:HBader@cei.org>>> wrote:

Here is the attached file I meant to send. (It fixes the date to tomorrow's date from September 10. it also corrects inconsistent capitalization of "Plaintiff" and "Defendant" in the version I sent you at 5:04 p.m. and substitutes "Plaintiff" for the word "CEI" to be consistent). Sorry about that!

Thanks,

Hans Bader  
202-331-2278

From: Hans Bader  
Sent: Thursday, September 12, 2013 5:04 PM  
To: 'Lo, Michelle (USADC)'; Chris Horner  
Cc: Sam Kazman  
Subject: RE: CEI v. EPA, 13-0779 (BAH)

Would you object to us filing the stipulation of dismissal, with the addition of a recital of what you told us to explain why we are dismissing, to wit, adding the following sentence memorializing what you told us earlier:

Plaintiff agrees to do so because it has been advised by defendant that there are no responsive records, in light of the fact that (1) to the best of her recollection, Ms. McCarthy used the texting function on her EPA phone for personal purposes only and not to conduct Agency business; and (2) none of her texts over the period encompassing the 18 specific dates at issue in plaintiff's FOIA request (July 9, 2009, to June 29, 2012) were preserved.

We would be pleased to file such a stipulation of dismissal. (With the recital added, it is attached).

Thanks,

Hans

From: Lo, Michelle (USADC)  
[<mailto:Michelle.Lo2@usdoj.gov>]<<mailto:Michelle.Lo2@usdoj.gov>>



Sent: Tuesday, September 10, 2013 12:22 PM  
To: Hans Bader; Chris Horner  
Cc: Sam Kazman  
Subject: RE: CEI v. EPA, 13-0779 (BAH)

Thank you. We had exchanged a draft stipulation of dismissal at the time our discussions began, so I'm attaching it here with a revision to my new phone number. I'll look out for the filing of the stipulation in a day or two.

Michelle Lo  
Assistant United States Attorney  
Civil Division  
555 4th Street, N.W.  
Washington, D.C. 20530  
(202) 252-2541 - Please note new number  
(202) 514-8780 fax  
Michelle.Lo2@usdoj.gov<<mailto:Michelle.Lo2@usdoj.gov>>

From: Hans Bader [<mailto:HBader@cei.org>]<[mailto:\[mailto:HBader@cei.org\]](mailto:[mailto:HBader@cei.org])>  
Sent: Tuesday, September 10, 2013 12:17 PM  
To: Lo, Michelle (USADC); Chris Horner  
Cc: Sam Kazman  
Subject: RE: CEI v. EPA, 13-0779 (BAH)

OK. We will dismiss (I am busy writing a brief in another case, but will be done with that in a day or two, and can execute a dismissal notice then).

From: Lo, Michelle (USADC) [<mailto:Michelle.Lo2@usdoj.gov>]  
Sent: Tuesday, September 10, 2013 12:14 PM  
To: Chris Horner  
Cc: Hans Bader; Sam Kazman  
Subject: RE: CEI v. EPA, 13-0779 (BAH)

If you could please let me know by this afternoon whether you will be dismissing this case, I would appreciate it. Under the current schedule, our opening brief is due on Monday, September 16, so we will need to plan accordingly since Judge Howell requires any extension motions to be filed at least four days prior to the deadline.

From: Chris Horner  
[<mailto:chornerlaw@aol.com>]<[mailto:\[mailto:chornerlaw@aol.com\]](mailto:[mailto:chornerlaw@aol.com])>  
Sent: Monday, September 09, 2013 4:43 PM  
To: Lo, Michelle (USADC)  
Cc: HBader@cei.org<<mailto:HBader@cei.org>>;  
SKazman@cei.org<<mailto:SKazman@cei.org>>  
Subject: Re: CEI v. EPA, 13-0779 (BAH)

Ok. Thank you.

Sent from my iPhone

On Sep 9, 2013, at 4:37 PM, "Lo, Michelle (USADC)"  
<Michelle.Lo2@usdoj.gov<<mailto:Michelle.Lo2@usdoj.gov>>> wrote:  
I had hoped to avoid this very problem, which is why I thought it would be productive for us to discuss over the phone. I don't think there is any ambiguity in my emails, but, yes, I can confirm again that I am saying the approximately three-year period from July 9, 2009 to June 29, 2012.

Thanks,  
Michelle

From: Chris Horner [<mailto:chornerlaw@aol.com>]  
Sent: Monday, September 09, 2013 4:21 PM  
To: Lo, Michelle (USADC); HBader@cei.org<<mailto:HBader@cei.org>>  
Cc: SKazman@cei.org<<mailto:SKazman@cei.org>>  
Subject: Re: CEI v. EPA, 13-0779 (BAH)

I'm sorry but I keep reading two meanings in most of these messages.  
Please confirm you are saying the approximately three-year period from July 9, 2009 to June 29, 2012?

Best,  
Chris Horner  
\*\*\*\*\*

The information contained in this message may be privileged. This transmission is therefore intended by the sender to be confidential and intended only for the proper recipient. If you are not the intended recipient distribution of this message is prohibited.

-----Original Message-----

From: Lo, Michelle (USADC) (USADC)  
<Michelle.Lo2@usdoj.gov<<mailto:Michelle.Lo2@usdoj.gov>>>  
To: Hans Bader <HBader@cei.org<<mailto:HBader@cei.org>>>; Chris Horner  
<chornerlaw@aol.com<<mailto:chornerlaw@aol.com>>>  
Cc: Sam Kazman <SKazman@cei.org<<mailto:SKazman@cei.org>>>  
Sent: Mon, Sep 9, 2013 4:17 pm  
Subject: RE: CEI v. EPA, 13-0779 (BAH)  
Yes, I mean all the dates between the period from July 9, 2009, to June 29, 2012.

From: Hans Bader [<mailto:HBader@cei.org><<mailto:HBader@cei.org>?>]  
Sent: Monday, September 09, 2013 3:51 PM  
To: Lo, Michelle (USADC); Chris Horner  
Cc: Sam Kazman  
Subject: RE: CEI v. EPA, 13-0779 (BAH)

Thanks. By "encompassing," you mean not just the 18 dates, but also the interstitial dates between them, right? (When we spoke over the phone, I did not think in detail over what was meant by the words "entire period" when you said at that time, "none of her texts over the entire period . . .", although this is still helpful). Thanks.

From: Lo, Michelle (USADC) [<mailto:Michelle.Lo2@usdoj.gov>]  
Sent: Monday, September 9, 2013 3:46 PM  
To: Chris Horner; Hans Bader  
Cc: Sam Kazman  
Subject: RE: CEI v. EPA, 13-0779 (BAH)

Chris,

I was not able to reach you just now, but I did speak with Hans and had a beneficial discussion with him. Although the requested clarification in your August 1 email goes beyond the scope of CEI's FOIA request, which seeks only text messages sent by Ms. McCarthy on the 18 specific dates, the EPA is willing to respond in the interest of reaching an amicable resolution. The agency's position is as follows:

To the very best of her recollection, Ms. McCarthy used the texting function on her EPA phone for personal purposes only and not to conduct Agency business. None of her texts over the period encompassing the 18 specific dates at issue in CEI's FOIA request (July 9, 2009, to June 29, 2012) were preserved.

We believe this should clarify any remaining ambiguity and obviate the need for further litigation. I am of course available to discuss further if you think that would be helpful. I would appreciate it if you can let me know by tomorrow if this resolves all outstanding issues.

Thanks,  
Michelle

From: Lo, Michelle (USADC)  
Sent: Monday, September 09, 2013 11:28 AM  
To: 'Chris Horner'; HBader@cei.org<<mailto:HBader@cei.org>>  
Cc: SKazman@cei.org<<mailto:SKazman@cei.org>>  
Subject: RE: CEI v. EPA, 13-0779 (BAH)

Yes, I think there is progress on this issue, and it would be helpful for us to have a brief discussion. Please let me know when you are available. Thanks.

From: Chris Horner [<mailto:chornerlaw@aol.com>]  
Sent: Monday, September 09, 2013 11:24 AM  
To: Lo, Michelle (USADC); HBader@cei.org<<mailto:HBader@cei.org>>  
Cc: SKazman@cei.org<<mailto:SKazman@cei.org>>  
Subject: Re: CEI v. EPA, 13-0779 (BAH)

The below is where I think things were when we left off. FYI

From my 8/01 email:

we have only sought one clear statement, I \*think\* you may just clarified the ambiguity as explained below. But if you plainly state what is implied we can dismiss.  
Below you more strongly imply what seemed the implication before, but is still not stated outright with no room for misunderstanding. That is that Ms. McCarthy \*only\* used the texting function on her EPA phone for personal messages; and because she never used it for work this is why EPA has preserved none of her texts.  
If that is what you were saying, would you please confirm that and that this is also EPA's position. In that case, you need not take any further questions to EPA and I accept the 'no records' response as sufficient such that we will dismiss.

Is there any progress on this?

Best,  
Chris Horner

-----Original Message-----

From: Lo, Michelle (USADC) (USADC)  
<Michelle.Lo2@usdoj.gov<<mailto:Michelle.Lo2@usdoj.gov>>>  
To: Hans Bader <HBader@cei.org<<mailto:HBader@cei.org>>>; Chris Horner  
<chornerlaw@aol.com<<mailto:chornerlaw@aol.com>>>  
Cc: Sam Kazman <SKazman@cei.org<<mailto:SKazman@cei.org>>>  
Sent: Fri, Aug 16, 2013 1:51 pm  
Subject: RE: CEI v. EPA, 13-0779 (BAH)

My apologies for the delay, I am still waiting to hear from EPA. I think there are availability issues due to this being August, but I will get back to you as soon as I can.

From: Hans Bader [<mailto:HBader@cei.org><<mailto:HBader@cei.org>?>]  
Sent: Friday, August 16, 2013 1:48 PM  
To: Lo, Michelle (USADC); Chris Horner  
Cc: Sam Kazman  
Subject: RE: CEI v. EPA, 13-0779 (BAH)

Thanks. Hopefully, you will hear soon from EPA (your email below suggested you would hear from EPA by the week of August 5, which has now come and gone).

From: Lo, Michelle (USADC) [<mailto:Michelle.Lo2@usdoj.gov>]  
Sent: Friday, August 02, 2013 4:09 PM  
To: Chris Horner; Hans Bader  
Cc: Sam Kazman  
Subject: RE: CEI v. EPA, 13-0779 (BAH)

Thanks, Chris. It is looking like I will not be able to get a response from the Agency today (due to availability issues), so I think it makes most sense for us to go ahead and file a status report with the proposed briefing schedule so we are in compliance with the Court's standing order. I should hear from EPA by early next week, so we can continue our discussions at that time. If the attached draft report is acceptable, let me know and I can take care of the filing.

From: chornelaw@aol.com<<mailto:chornelaw@aol.com>>  
[<mailto:chornelaw@aol.com>]  
Sent: Friday, August 02, 2013 2:54 PM  
To: Lo, Michelle (USADC); hbader@cei.org<<mailto:hbader@cei.org>>  
Cc: skazman@cei.org<<mailto:skazman@cei.org>>  
Subject: RE: CEI v. EPA, 13-0779 (BAH)

Yes I will, am in a mtg 3-5-something but will be able to email I think, cch Sent from my Verizon Wireless 4G LTE smartphone

"Lo, Michelle (USADC)" wrote:  
Dear Chris,

I am waiting to hear back from the EPA regarding your follow-up inquiry below. I am hopeful that I will have a response to you today, but it may not be until around 5 pm due to various individuals' availability. Will you be available then so we can figure out whether we will be filing a dismissal or a proposed briefing schedule at that time?

Thanks,  
Michelle

From: chornelaw@aol.com<<mailto:chornelaw@aol.com>>  
[<mailto:chornelaw@aol.com>]  
Sent: Thursday, August 01, 2013 10:05 PM  
To: Lo, Michelle (USADC); hbader@cei.org<<mailto:hbader@cei.org>>  
Cc: skazman@cei.org<<mailto:skazman@cei.org>>  
Subject: RE: CEI v. EPA, 13-0779 (BAH)

Dear Michelle,  
Rather than endless rounds of clarification, though we have only sought one clear statement, I \*think\* you may just clarified the ambiguity as explained below. But if you plainly state what is implied we can dismiss. Below you more strongly imply what seemed the implication before, but is still not stated outright with no room for misunderstanding. That is that Ms. McCarthy \*only\* used the texting function on her EPA phone for personal messages; and because she never used it for work this is why EPA has preserved none of her texts. If that is what you were saying, would you please confirm that and that this is also EPA's position. In that case, you need not take any further questions to EPA and I accept the 'no records' response as sufficient such that we will dismiss.

I look forward to your reply.

Best,  
Chris

Sent from my Verizon Wireless 4G LTE smartphone

"Lo, Michelle (USADC)" wrote:  
Chris,

I will take your request back to the agency, but I would like to be clear in what I will be communicating to the agency. The Agency has already explained that Ms. McCarthy uses text messaging for family and other personal business, not government business and that, because personal text messages are unrelated to Agency business, they were not required to be preserved by the Agency. I am not sure how you read this statement to mean that Ms. McCarthy uses the texting function for EPA business. As I explained to Hans, this FOIA request deals with text messages on 18 specific dates, and we have already provided a very clear explanation for the "no records" response.

If what you are asking is - did Ms. McCarthy send ever any text messages that were work-related - I can ask the EPA if it would be willing to respond to this question even though it is well outside the scope of the FOIA request and does not alter the fact that the EPA did not locate any text messages on the 18 specific dates. If the EPA is willing to respond to the question of whether Ms. McCarthy ever sent any text messages that were work-related, can you represent that you will dismiss this case? As much as I think briefing would be an unnecessary use of the Court's and the parties' resources, it may be that we end up having to brief this matter rather than engage in endless rounds of clarification.

Best,  
Michelle

From: Chris Horner [<mailto:chornerlaw@aol.com>]  
Sent: Thursday, August 01, 2013 6:41 PM  
To: HBader@cei.org<<mailto:HBader@cei.org>>; Lo, Michelle (USADC)  
Cc: SKazman@cei.org<<mailto:SKazman@cei.org>>  
Subject: Re: CEI v. EPA, 13-0779 (BAH)

Dera Michelle,

Please consider the following, in addition to what Hans has written you.

EPA's obligation is to demonstrate 'no records'. So far they have stated it. Demonstration is found in the bills for her device.

We have obtained what EPA claims to be the relevant (texting) portions of those bills, showing extensive texting activity, so extensive that it is thoroughly implausible that Ms. McCarthy didn't text on those dates.

After we calculated the probability (1 in 7.9 sextillion), we received your statement on EPA's behalf including the portion that is the basis for the ambiguity that Hans refers to and under which we cannot dismiss, but possibly can if you clarify what it is saying:

Ms. McCarthy uses text messaging to communicate with her family. Ms. McCarthy uses email for government business, and text messaging for family and other personal business. These personal text messages are unrelated to Agency business, and thus were not required to be preserved by the Agency. <CEI v EPA No 13-779 draft Stipulation of Dismissal with recital fixed by CEI.doc>

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

COMPETITIVE ENTERPRISE INSTITUTE	)	
	)	
Plaintiff,	)	
v.	)	Case No. 13-779-BAH
	)	
UNITED STATES ENVIRONMENTAL	)	
PROTECTION AGENCY	)	
	)	
Defendant.	)	
	)	

**STIPULATION OF DISMISSAL**

The parties to the above-entitled action hereby stipulate to dismiss this entire action against the Defendant, United States Environmental Protection Agency, without prejudice pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(ii), with each party to bear its own costs and fees.

Respectfully submitted,

/s/ Hans Bader  
Hans Bader, D.C. Bar No. 466545  
Sam Kazman, D.C. Bar No. 946376  
Competitive Enterprise Institute  
1899 L Street, N.W. 12th floor  
Washington, D.C. 20036

*Attorneys for Plaintiff*

RONALD C. MACHEN JR., D.C. Bar # 447889  
United States Attorney  
for the District of Columbia

DANIEL F. VAN HORN, D.C. Bar #924092  
Chief, Civil Division

By: /s/ Michelle Lo.  
MICHELLE LO  
Assistant United States Attorney  
555 Fourth St., N.W.  
Washington, D.C. 20530  
Tel: (202) 252-2541; Fax: (202) 252-2599  
Michelle.Lo2@usdoj.gov

*Attorneys for Defendant*

Dated: September 13, 2013

**PROOF OF SERVICE**

The undersigned counsel certifies that on September 13, 2013, he caused the foregoing Stipulation of Dismissal to be filed electronically with this Court through the CM/ECF filing system. Notice of this filing was automatically sent to counsel for all parties by operation of the Court's CM/ECF system. The counsel thus automatically receiving notice included the following counsel for defendant:

Michelle Lo  
Assistant United States Attorney  
555 4th Street, N.W., Washington, D.C. 20530  
Michelle.Lo2@usdoj.gov

/s/ Hans Bader  
Hans Bader, D.C. Bar # 466545  
COMPETITIVE ENTERPRISE INSTITUTE  
1899 L Street, NW, 12<sup>th</sup> Floor  
Washington, D.C. 20036  
(202) 331-2278

**From:** [Garbow, Avi](#)  
**To:** [Minoli, Kevin](#); [McDermott, Marna](#)  
**Subject:** FW: FOIA request/litigation from Competitive Enterprise Institute for info re Gina McCarthy IT training  
**Date:** Thursday, August 08, 2013 3:31:09 PM  
**Attachments:** [GinaMcCarthy09.JPG](#)  
[FOIA Response Attachment HQ-2013-005618.pdf](#)  
[MCCARTHY 2010 NSI training.pdf](#)  
[MCCARTHY 2011 Cybersecurity Training.pdf](#)  
[MCCARTHY 2012 Ethics.pdf](#)  
[MCCARTHY 2013 Information Security Awareness Training.pdf](#)  
[MCCARTHY 2013 Information Security Awareness Training \(2\).pdf](#)  
[EPA-HQ-2013-005618 FOIA Response 8.8.13 FINAL v2.docx](#)

---

(b) (5) DPP

fyi

Avi Garbow  
General Counsel  
U.S. Environmental Protection Agency  
(202) 564-1917 Cell (b) (6)

-----Original Message-----

From: Fritz, Matthew  
Sent: Thursday, August 08, 2013 2:58 PM  
To: Reynolds, Thomas  
Cc: Garbow, Avi  
Subject: FW: FOIA request/litigation from Competitive Enterprise Institute for info re Gina McCarthy IT training

Tom,

FYI

-----Original Message-----

From: Anderson, Cindy  
Sent: Thursday, August 08, 2013 2:35 PM  
To: Fritz, Matthew  
Subject: FOIA request/litigation from Competitive Enterprise Institute for info re Gina McCarthy IT training

Matt -

I'm an attorney in the Info Law Practice Group (General Law Office) and serving as Agency Counsel in two recent FOIA lawsuits from Competitive Enterprise Institute (and its sister org, American Traditions Institute/ATI).

As you may know, CEI has myriad FOIA requests and litigation challenging EPA regarding the use of personal email accounts, the granting of fee waivers, and whether or not Gina McCarthy has ever used text messages among other matters.

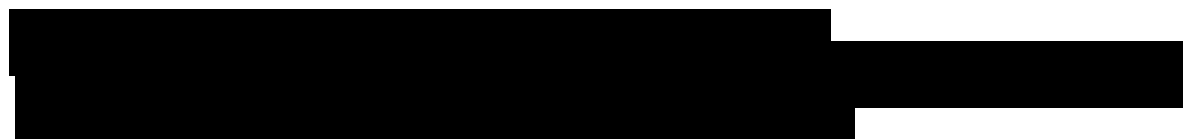

(b) (5) DPP, (b) (5) ACP, (b) (5) AWP

[REDACTED]

[REDACTED]



(b) (5) DPP, (b) (5) ACP, (b) (5) AWP



Please call me anytime with questions or if you'd like to discuss this FOIA request and lawsuit.

Thanks!

Cindy Anderson

EPA/OGC

(202) 564-2690

---

-----Original Message-----

From: Hilton, Patricia

Sent: Thursday, August 08, 2013 1:32 PM

To: Anderson, Cindy

Cc: Maher, Karen; Watkins, Harrell; Huang, Cindy; Weinstock, Larry

Subject: RE: McCarthy 2013 it tng

Hi Cindy,

Here is another version of the FOIA response to Mr. Horner which incorporates a response for all three areas mentioned in his original request. I've also incorporated the appeal language.

In addition, I've included all of the attachments that will need to be included. Please let me know if you have any questions. I will wait to hear from you before having Harrell Watkins sign off. Thanks, Pat

Patricia Hilton (Pat), Special Assistant Office of Technology Operations and Planning (OTOP) Office of Environmental Information (OEI) Office (202) 566-1636 Fax (202) 566-0319

[Close this window](#)

## Learner Records Progress Report:

Login Name: mccarthy.gina@epa.gov

Learner Name: McCarthy, Gina

---

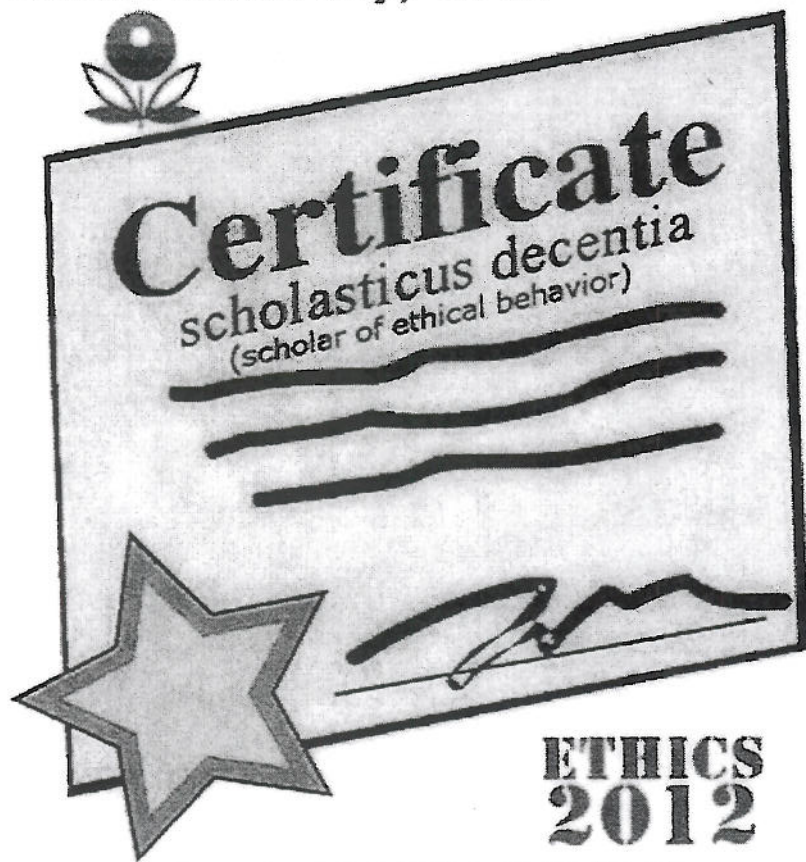
### epa\_sat\_fy13\_fgcs\_enus: FY13 Security Awareness and Training

	Preassess	High Score	Current Score
First Access:	Jun 27, 2013 3:21 PM		
Last Access:	Jul 30, 2013 4:57 PM		
Times Accessed:	3; Duration: 00:04:07		
Lesson 1	-	93	93
Overall Score	-	93	93

---

'0' (zero) score indicates that the assessment was attempted but no objectives were passed  
n/a indicates that an assessment is not available.

**Gina McCarthy, OAR**



**Certificate issued: 12/13/2012 10:32:59 AM**

**Certificate ID Number: DCOG-92XL96**

**Full Organization: OAR,OAA,IO**

According to the EPA Domino Directory.  
Contact your local Help Desk if this  
organizational information is not correct.



## Test Score Report

**Student Name:** McCarthy, Gina  
**Course Title:** FY11 Cybersecurity Awareness Training  
**Start Date:** Aug 3, 2011  
**Current Course Score:** 97%  
**Completion Status:** Completed  
**Completion Date:** Aug 3, 2011

In order to complete this course, you must meet the following criteria in one or more sessions:

- Complete tests on all the course content and achieve an overall course score of 70%

	Pre-test Score	Highest Score	Current Score
<b>Risk</b>	---	100%	100%
Lesson Overview	---	100%	100%
Risk	N/A	N/A	N/A
<b>Cyber Threats</b>	67%	92%	92%
Lesson Overview	67%	92%	92%
Cyber Threats	N/A	N/A	N/A
Hackers	N/A	N/A	N/A
Cyber Warfare	N/A	N/A	N/A
Malicious Code	N/A	N/A	N/A
Information Gathering	N/A	N/A	N/A
<b>EPA's Information</b>	100%	100%	100%
Lesson Overview	100%	100%	100%
What is CUI?	N/A	N/A	N/A
What is PII?	N/A	N/A	N/A
<b>Mobile Devices</b>	N/A	N/A	N/A
Lesson Overview	N/A	N/A	N/A
Mobile Devices	N/A	N/A	N/A
<b>Rules of Behavior</b>	N/A	N/A	N/A
Security Rules of Behavior	N/A	N/A	N/A
<b>Who to Contact</b>	N/A	N/A	N/A
Who to Contact	N/A	N/A	N/A

*Certificate of Completion*  
*National Security Information*  
*Annual Refresher Training*  
**2010**

*Provided To*

**Gina McCarthy**

*Diane K. Lasher*  
NIS Program Coordinator

11/10/2010  
Date





## Employee History

Close

**First Name**  
Gina

**Last Name**  
McCarthy

**Affiliation**  
EPA

**Notes Name**  
CN=Gina McCarthy/OU=DC/O=USEPA/C=US; Gina McCarthy

**Site**  
Headquarters

**Organization**  
OAR,OAA,IO

**Organization Code**  
6101

Date Completed	Status - Security Awareness	Course Title
03/25/2009 10:02 PM	Completed	

### ▼ Audit History

## Audit History

08/28/2009 09:03:12 AM Steve Vineski fldLessonDone [] ==> [Completed via Other Methods] fldLessonHistory [] ==> [Completed via Other Methods] fldSortedLessonHistory [] ==> [Completed via Other Methods]

### Completion Notes

Completed via Other Methods



## Skillport Learning Activity-All Assets

mccarthy.gina@epa.gov

From 2009-01-21 through 2013-07-25

Completion Status = Any

User Status: Activated, Deactivated

EPA Organization	Asset Title	Asset ID	Last Access Date	Times Accessed	Completion Status
OAR, OAA, IO	Working Effectively with Tribal Governments - Assistive Technology Users Only	_pc_sppubepa__aleowetg_2012text	2012-09-07	3	In Progress
OAR, OAA, IO	Overview of Office 365 for EPA	_scomm12_epa_365overview_0213b	2013-02-11	1	Completed
OAR, OAA, IO	Working Effectively with Tribal Governments	_scomm12_epa_aieo_wetg_2012	2012-09-07	2	In Progress
OAR, OAA, IO	2013 Continuity of Operations (COOP) Awareness Training	_scomm12_epa_epa_coop_fy13_fgceenus	2013-06-27	1	In Progress
OAR, OAA, IO	FY13 Security Awareness and Training	epa_sat_fy13_fgceenus	2013-06-27	7	In Progress
OAR, OAA, IO	The No FEAR Act (Update Available)	fgov_01_a01_bs_enus	2012-06-25	3	Completed
OAR, OAA, IO	FY11 Cybersecurity Awareness Training	zepa_itsa_a11_bsc_enus	2011-08-03	1	Completed

**From:** [McDermott, Marna](#)  
**To:** [Veney, Carla](#); [Minoli, Kevin](#); [Jones, Gail-R](#)  
**Subject:** FW: GM Text Message Case Options  
**Date:** Wednesday, September 04, 2013 5:07:00 PM  
**Attachments:** [GM Texts Options 9 04 13.docx](#) (b) (5) DPP, (b) (5) ACP, (b) (5) AWP

---

Another doc that would be useful for Kevin and Avi to read before the 9:30 tomorrow. Thanks.

Marna McDermott  
Associate Deputy General Counsel  
U.S. Environmental Protection Agency  
(202) 564-2890



**From:** [Nguyen, Quoc](#)  
**To:** [Kelly, Lynn](#)  
**Cc:** [McDermott, Marna](#); [Miller, Kevin](#)  
**Subject:** FW: GM Text Message Case Options  
**Date:** Wednesday, September 04, 2013 2:12:16 PM  
**Attachments:** [Q&As.pdf](#)  
[Email negotiation.pdf](#)  
[GM Texts Options.docx](#)  
[2013 8 22 chart showing basic document management obligations with jh.docx](#)  
[Doc 6 ecf d Answer.pdf](#)  
[Doc 1 Complaint.pdf](#)

(b) (5) DPP, (b) (5) ACP

(b) (5) DPP, (b) (5) ACP, (b) (5) AWP

(b) (5) DPP, (b) (5) ACP

---

Hi Lynn,

I took a quick look at your options paper and it looks fine to me. Kevin/Marna, did you have any other thoughts?

Thanks,  
Quoc

Quoc P. Nguyen  
Office of General Counsel  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, NW  
Washington, DC 20010  
202-564-6343

CONFIDENTIAL communication for internal deliberations only; may contain deliberative, attorney-client, attorney work product, or otherwise privileged material; do not distribute outside EPA or DOJ.

---

**From:** Kelly, Lynn  
**Sent:** Friday, August 23, 2013 4:58 PM  
**To:** McDermott, Marna; Nguyen, Quoc  
**Cc:** Miller, Kevin  
**Subject:** GM Text Message Case Options

Marna/Quoc:

Please find attached a draft options paper for Avi. I apologize I was unable to get this to you earlier this week.

Since this is just a first draft, and Marna you will likely not have time to review today and are out M/Tuesday, I suggest that Quoc, if you could review this material and make any edits you think are necessary on Monday or Tuesday, and provide to Marna by sometime Wednesday, Marna can then review W/Thursday to see if it is ready to move along, or needs to wait until I get back for further work.

I understand with how complicated this is it may be difficult to move along in my absence but I appreciate anything you both can do to position this matter the best we can while I am away. (b) (5) DPP, (b) (5) ACP, (b) (5) AWP [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Quoc: Michelle Lo is the AUSA (202-252-2541) (b) (5) DPP, (b) (5) ACP [REDACTED]

[REDACTED] She is also out of the office August 28 – Sept. 2.

**Thanks very much for anything you can do on this next week!**

Lynn Kelly | US EPA | Office of General Counsel | 1200 Pennsylvania Ave., NW | WJC North, Mail Code 2377A | Washington DC 20460 | phone: (202) 564-3266

The contents of this e-mail and any attachments to it may contain deliberative-process, attorney-client, attorney work product, or otherwise privileged material. If you are not the intended recipient, or believe you have received this communication in error, please delete the copy you received, and do not print, copy, retransmit, disseminate, or otherwise use the information. Thank you.

**From:** [Lo, Michelle \(USADC\)](#)  
**To:** [Kelly, Lynn](#)  
**Subject:** FW: CEI v. EPA, 13-0779 (BAH)  
**Date:** Friday, August 02, 2013 9:39:07 AM

---

**From:** chornerlaw@aol.com [mailto:chornerlaw@aol.com]  
**Sent:** Thursday, August 01, 2013 10:05 PM  
**To:** Lo, Michelle (USADC); hbader@cei.org  
**Cc:** skazman@cei.org  
**Subject:** RE: CEI v. EPA, 13-0779 (BAH)

Dear Michelle,

Rather than endless rounds of clarification, though we have only sought one clear statement, I *\*think\** you may just clarified the ambiguity as explained below. But if you plainly state what is implied we can dismiss.

Below you more strongly imply what seemed the implication before, but is still not stated outright with no room for misunderstanding. That is that Ms. McCarthy *\*only\** used the texting function on her EPA phone for personal messages; and because she never used it for work this is why EPA has preserved none of her texts.

If that is what you were saying, would you please confirm that and that this is also EPA's position. In that case, you need not take any further questions to EPA and I accept the 'no records' response as sufficient such that we will dismiss.

I look forward to your reply.

Best,  
Chris

Sent from my Verizon Wireless 4G LTE smartphone

"Lo, Michelle (USADC)" wrote:

Chris,

I will take your request back to the agency, but I would like to be clear in what I will be communicating to the agency. The Agency has already explained that Ms. McCarthy uses text messaging for family and other personal business, not government business and that, because personal text messages are unrelated to Agency business, they were not required to be preserved by the Agency. I am not sure how you read this statement to mean that Ms. McCarthy uses the texting function for EPA business. As I explained to Hans, this FOIA request deals with text messages on 18 specific dates, and we have already provided a very clear explanation for the "no records" response.

If what you are asking is – did Ms. McCarthy send ever any text messages that were work-related – I can ask the EPA if it would be willing to respond to this question even though it is well outside the scope of the FOIA request and does not alter the fact that the EPA did not locate any text messages on the 18 specific dates. If the EPA is willing to respond to the question of whether Ms. McCarthy ever sent any text messages that were work-related, can you represent that you will dismiss this case? As much as I think briefing would be an unnecessary use of the Court's and the parties' resources, it may be that we end up having to brief this matter rather than engage in endless rounds of clarification.

Best,  
Michelle

**From:** Chris Horner [<mailto:chornerlaw@aol.com>]  
**Sent:** Thursday, August 01, 2013 6:41 PM  
**To:** [HBader@cei.org](mailto:HBader@cei.org); Lo, Michelle (USADC)  
**Cc:** [SKazman@cei.org](mailto:SKazman@cei.org)  
**Subject:** Re: CEI v. EPA, 13-0779 (BAH)

Dera Michelle,

Please consider the following, in addition to what Hans has written you.

EPA's obligation is to *demonstrate* 'no records'. So far they have stated it. Demonstration is found in the bills for her device.

We have obtained what EPA claims to be the relevant (texting) portions of those bills, showing extensive texting activity, so extensive that it is thoroughly implausible that Ms. McCarthy didn't text on those dates.

After we calculated the probability (1 in 7.9 sextillion), we received your statement on EPA's behalf including the portion that is the basis for the ambiguity that Hans refers to and under which we cannot dismiss, but possibly can if you clarify what it is saying:

Ms. McCarthy uses text messaging to communicate with her family. Ms. McCarthy uses email for government business, and text messaging for family and other personal business. These personal text messages are unrelated to Agency business, and thus were not required to be preserved by the Agency.

To me this plainly implied that EPA's position is that Ms. McCarthy uses email for work and the text messaging function *only* for personal messages, and therefore EPA has not preserved her text messaging. If that is the case, and EPA state it, then the 'no records' response is sufficient and we can, I believe, dismiss.

However, another of us suggested that in context it implies something materially different, that while Ms. McCarthy uses the texting function for EPA business, on the 18 dates at issue in this matter all texts sent or received by Ms. McCarthy were personal, which is why those specific text messages are not preserved. We have not had our stats people run the probability of that but I suggest it is for all practical purposes the same as the idea that she did not text on those 18 dates.

Regardless, it may imply both but we cannot reasonably discern which, and so we ask you to state which is EPA's assertion. This is material because of EPA's obligation to demonstrate, and the sole (and most reasonable) demonstration -- her phone bills -- indicating that one of these readings is implausible, and under that reading therefore so is the 'no records' claim. The other reading is more plausible and makes the 'no records' response plausible.

So, we simply would like clarification of the ambiguous statement: over the period in question, did EPA preserve

some of Ms. McCarthy's text messages -- those that someone determined were work-related -- or did they preserve none of them because they were all personal?

If we have a clear answer to this then depending on that clarification we can possibly dismiss, or we know we cannot justify doing so. We also cannot justify doing so in the absence of a clarification of an ambiguous assertion. Clarifying it is of course much simpler than further litigating this if that clarification would enable resolution and dismissal.

But as such, we need it to be a formal representation, in writing.

We look forward to your response.

Best,  
Chris Horner

\*\*\*\*\*

The information contained in this message may be privileged. This transmission is therefore intended by the sender to be confidential and intended only for the proper recipient. If you are not the intended recipient distribution of this message is prohibited.

-----Original Message-----

From: Hans Bader <[HBader@cei.org](mailto:HBader@cei.org)>  
To: Lo, Michelle (USADC) (USADC) <[Michelle.Lo2@usdoj.gov](mailto:Michelle.Lo2@usdoj.gov)>  
Cc: Sam Kazman <[SKazman@cei.org](mailto:SKazman@cei.org)>; Chris Horner <[chornerlaw@aol.com](mailto:chornerlaw@aol.com)>  
Sent: Thu, Aug 1, 2013 11:30 am  
Subject: RE: CEI v. EPA, 13-0779 (BAH)

I should note that we have no objection to the proposed briefing schedule you suggested

(EPA's Motion for Summary Judgment  
CEI's Opposition to EPA's Motion for Summary Judgment  
EPA's Reply  
6, 2013).

September 16, 2013  
October 16, 2013  
November

But, hopefully, we can tie up the loose ends described below in my earlier email, and moot the need for any summary judgment motion (by resolving the case before then).

I will call you in a few minutes to try to get these things squared away.

Thanks,

Hans Bader  
CEI

---

**From:** Hans Bader  
**Sent:** Wednesday, July 31, 2013 8:25 PM  
**To:** 'Lo, Michelle (USADC)'  
**Cc:** Sam Kazman; Chris Horner  
**Subject:** RE: CEI v. EPA, 13-0779 (BAH)

You are correct that I am only seeking the text messages for 18 specific dates, not the text messages in general. The reason I am asking about the text messages not being preserved in general over that period (July 9, 2009 to June 29, 2012) is just to confirm the apparent reason why the text messages don't exist for those 18 dates. Once this is understood, the query makes sense, to clarify matters and eliminate any ambiguities.

Thanks,

Hans

---

**From:** Lo, Michelle (USADC) [<mailto:Michelle.Lo2@usdoj.gov>]  
**Sent:** Wednesday, July 31, 2013 6:19 PM  
**To:** Hans Bader  
**Cc:** Sam Kazman; Chris Horner  
**Subject:** RE: CEI v. EPA, 13-0779 (BAH)

Dear Hans,

As I stated below and as reflected in the EPA's answer to the complaint, the Agency did not locate any text messages for the 18 dates specified by your FOIA request. As for your question about the preservation of Ms. McCarthy's text messages in general, we are now going well beyond the scope of this FOIA litigation, and I do not believe this is the appropriate forum to address this question.

Thanks,  
Michelle

---

**From:** Hans Bader [<mailto:HBader@cei.org>]  
**Sent:** Wednesday, July 31, 2013 4:08 PM  
**To:** Lo, Michelle (USADC)  
**Cc:** Sam Kazman; Chris Horner  
**Subject:** RE: CEI v. EPA, 13-0779 (BAH)

Thanks for the clarifying details. Does this mean that her text messages in general weren't preserved, or just that the agency didn't locate any such messages for the 18 dates specified by the FOIA request? (Just tying up loose ends.)

Thanks,

Hans

---

**From:** Lo, Michelle (USADC) [<mailto:Michelle.Lo2@usdoj.gov>]  
**Sent:** Wednesday, July 31, 2013 3:42 PM  
**To:** Hans Bader  
**Cc:** Sam Kazman; Chris Horner  
**Subject:** RE: CEI v. EPA, 13-0779 (BAH)

Dear Hans,

Thank you for the call just now. To summarize our discussion, I've inquired with the EPA about your question below, and EPA has explained that the Agency did not locate any text messages responsive to your FOIA request at issue in this case. Moreover and in any event, Ms. McCarthy uses text messaging to communicate with her family. Ms. McCarthy uses email for government business, and text messaging for family and other personal business. These personal text messages are unrelated to Agency business, and thus were not required to be preserved by the Agency.

It's my understanding that you will be filing a stipulation of dismissal in this case. I do have one edit, which is to add "with each party to bear its own costs and fees" to the end of the stipulation. I have also made a formatting change to the signature block since my telephone number is changing. If these changes are acceptable to you, you are authorized to file the stipulation on behalf of the parties.

Thanks,

Michelle

Michelle Lo  
Assistant United States Attorney  
Civil Division  
555 4th Street, N.W.  
Washington, D.C. 20530  
(202) 252-2541 – **Please note new number**  
(202) 514-8780 fax  
[Michelle.Lo2@usdoj.gov](mailto:Michelle.Lo2@usdoj.gov)

---

**From:** Hans Bader [<mailto:HBader@cei.org>]  
**Sent:** Monday, July 29, 2013 3:02 PM  
**To:** Lo, Michelle (USADC)  
**Cc:** Sam Kazman; Chris Horner  
**Subject:** RE: CEI v. EPA, 13-0779 (BAH)

One final thing: My colleagues are curious and want an answer to the following question before we dismiss the case: How can there be no responsive records (as stated by EPA in its no-records response, and echoed in the answer), that is, no text messages, when EPA has elsewhere produced documents to us saying that Ms. McCarthy sent hundreds of text messages using her EPA device (see the attached administrative response by EPA to Chris Horner's FOIA request – the first attached file is EPA's cover letter in response to that request, and the second is its substantive response)? I'd like to get that clarification on that issue before filing the stipulation I sent earlier.

Thanks,

Hans Bader  
CEI

---

**From:** Hans Bader  
**Sent:** Monday, July 29, 2013 12:17 PM  
**To:** 'Lo, Michelle (USADC)'  
**Cc:** Sam Kazman  
**Subject:** RE: CEI v. EPA, 13-0779 (BAH)

Oops. The draft stipulation I sent in the below email had the wrong docket number on it. That has been fixed in the attached draft stipulation.

---

**From:** Hans Bader  
**Sent:** Monday, July 29, 2013 12:11 PM  
**To:** 'Lo, Michelle (USADC)'  
**Cc:** Sam Kazman  
**Subject:** RE: CEI v. EPA, 13-0779 (BAH)

Chris Horner remains very skeptical of the no-records response. Nevertheless, it seems to me that it may not be worth the candle to keep litigating this particular case, as a prudential matter.

Accordingly, plaintiff would be willing to file the attached stipulation of dismissal. If this is acceptable to you, then it can be filed with the court, and it will not be necessary to set a briefing schedule.

Sorry for the delay in responding.

Thank you.

Hans Bader  
Competitive Enterprise Institute  
(202) 331-2278  
[hbader@cei.org](mailto:hbader@cei.org)

---

**From:** Lo, Michelle (USADC) [<mailto:Michelle.Lo2@usdoj.gov>]  
**Sent:** Monday, July 29, 2013 10:11 AM  
**To:** Hans Bader  
**Subject:** RE: CEI v. EPA, 13-0779 (BAH)

Dear Hans:

Per Judge Howell's Standing Order, the parties are to jointly prepare and submit a report indicating whether the agency has made a final determination on compliance with the FOIA request at issue and propose a schedule for the filing of dispositive motions within 14 days after any defendant appears, or by this Friday, August 2. As you know, the EPA issued a "no records" response to CEI's FOIA request on May 31, 2013. Provided CEI intends to proceed with this litigation, we propose the following briefing schedule:

EPA's Motion for Summary Judgment	September 16, 2013
CEI's Opposition to EPA's Motion for Summary Judgment	October 16, 2013
EPA's Reply	November 6, 2013

Please let me know if the above proposal is agreeable to you. Thank you.

Michelle Lo  
Assistant United States Attorney  
Civil Division  
555 4th Street, N.W.  
Washington, D.C. 20530  
(202) 252-2541 – ***Please note new number***  
(202) 514-8780 fax  
[Michelle.Lo2@usdoj.gov](mailto:Michelle.Lo2@usdoj.gov)

---

**From:** Hans Bader [<mailto:HBader@cei.org>]  
**Sent:** Wednesday, July 17, 2013 6:06 PM  
**To:** Lo, Michelle (USADC)  
**Subject:** RE: CEI v. EPA, 13-0779 (BAH)

I am still waiting to hear back. Sorry about the delay.

---

**From:** Lo, Michelle (USADC) [<mailto:Michelle.Lo2@usdoj.gov>]  
**Sent:** Wednesday, July 17, 2013 6:00 PM  
**To:** Hans Bader  
**Subject:** RE: CEI v. EPA, 13-0779 (BAH)

Hans:

Have you had a chance to discuss with your colleagues whether CEI intends to move forward with this litigation in light of the EPA's no records response?

Thanks,  
Michelle

---

**From:** Lo, Michelle (USADC)



**Sent:** Thursday, July 11, 2013 4:12 PM  
**To:** Hans Bader <[HBader@cei.org](mailto:HBader@cei.org)> ([HBader@cei.org](mailto:HBader@cei.org))  
**Subject:** CEI v. EPA, 13-0779 (BAH)

Hans:

Attached is the EPA's response to CEI's FOIA request for "copies of all text messages sent by Assistant Administrator for Air and Radiation Gina McCarthy on a mobile telephone provided for her use by the Agency" that I was referring to on our call just now. Please let me know if CEI believes that further litigation of this case will be necessary in light of the EPA's no records response. Thank you.

<< File: Final Response 6005.pdf >>

Michelle Lo  
Assistant United States Attorney  
Civil Division  
555 4th Street, N.W.  
Washington, D.C. 20530  
(202) 514-5134; (202) 514-8780 fax  
[Michelle.Lo2@usdoj.gov](mailto:Michelle.Lo2@usdoj.gov)

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

COMPETITIVE ENTERPRISE INSTITUTE,

Plaintiff,

V.

Civil Action No. 13-0779 (BAH)

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY,

Defendant.

**ANSWER**

Defendant the United States Environmental Protection Agency (“EPA” or “Agency”), by and through the undersigned counsel, hereby responds to the Complaint filed by Plaintiff Competitive Enterprise Institute (“CEI”). In response to the numbered paragraphs and sentences of the Complaint, Defendant admits, denies, or otherwise responds as follows:

## FIRST DEFENSE

Defendant has conducted an adequate search in response to CEI's request under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, as amended, has fully responded to Plaintiff's FOIA request at no cost to Plaintiff, and no further relief is warranted.

## SECOND DEFENSE

The Complaint fails to state a claim upon which relief may be granted.

\* \* \*

1. This paragraph contains Plaintiff's characterization of this action, to which no response is required. To the extent a response is deemed necessary, Defendant avers that Plaintiff filed this Complaint purporting to bring claims under the FOIA, and denies the remaining allegations in this paragraph.

2. Admit that Plaintiff sent a FOIA request to EPA by electronic mail dated April 26, 2013, and respectfully refer the Court to the FOIA request for a complete and accurate statement of its contents. Deny the remaining allegations in this paragraph, including the allegation that Plaintiff's request sought text messages received by Assistant Administrator for Air and Radiation Gina McCarthy.

3. Deny the allegations in this paragraph, and aver that EPA responded to Plaintiff's FOIA request on May 31, 2013.

4. Admit that text messaging is "an alternative medium of communication to electronic mail (email)" and deny the remaining allegations in this paragraph.

5. The first sentence of this paragraph contains a conclusion of law to which no response is required. To the extent a response is deemed necessary, Defendant denies the allegations in the first sentence. Defendant further denies the second sentence of this paragraph.

6. Deny the allegation that "a senior Agency official cautioned McCarthy to cease using that function on her PDA" for lack of knowledge or information sufficient to form a belief as to the truth of the allegations, and further deny the remaining allegations in this paragraph.

7. Deny, for lack of knowledge or information sufficient to form a belief as to the truth of the allegations about the reasons Plaintiff filed its request. Deny the remaining allegations in this paragraph, and aver that EPA responded to Plaintiff's FOIA request on May 31, 2013.

8. Deny the allegations that the text messages at issue included text messages "sent to" Gina McCarthy, and respectfully refer the Court to the FOIA request for a complete and

accurate statement of its contents. Further deny the remaining allegations in this paragraph for lack of knowledge or information sufficient to form a belief as to the truth of the allegations.

9. Deny, and aver that EPA responded to Plaintiff's FOIA request on May 31, 2013.

10. Deny, for lack of knowledge or information sufficient to form a belief as to the truth of the allegations.

11. Admit.

12. This paragraph contains Plaintiff's statement of jurisdiction and states a conclusion of law to which no response is required. To the extent a response is required, Defendant does not contest the Court's subject matter jurisdiction.

13. This paragraph contains Plaintiff's statement of venue and states a conclusion of law to which no response is required. To the extent a response is required, Defendant does not contest that venue is proper.

14. Admit that EPA has not located, and therefore, has not provided any records responsive to Plaintiff's request. Deny the remaining allegations in this paragraph, and aver that EPA responded to Plaintiff's FOIA request on May 31, 2013.

15. Admit that EPA acknowledged Plaintiff's FOIA request and informed Plaintiff that it would not be billed for the request. Deny the remaining allegations in this paragraph, and aver that EPA responded to Plaintiff's FOIA request on May 31, 2013. The last sentence of this paragraph states a conclusion of law to which no response is required.

16. Deny, and aver that EPA responded to Plaintiff's FOIA request on May 31, 2013.

17. This paragraph contains Plaintiff's characterization of memoranda by government officials about transparency to which no response is required. The Court is respectfully referred to the cited documents as the best evidence of their contents.

18. Admit, and respectfully refer the Court to the FOIA request for a complete and accurate statement of its contents.

19. Admit that EPA assigned the underlying request with the tracking number EPA-HQ-2013-006005 by letter sent electronically through FOIA Online, the Agency's FOIA tracking and processing tool, but deny the allegation that the letter was dated and sent on May 9, 2013. Defendant avers that the referenced letter was dated and sent May 1, 2013, and respectfully refers the Court to the May 1, 2013, letter as the best evidence of its contents.

20. Deny that the May 9, 2013, letter is the same letter as the May 1, 2013, letter that acknowledged Plaintiff's FOIA request, as this paragraph mistakenly suggests, and deny that the letter is accurately quoted because it omits a word. Admit that EPA sent a letter on May 9, 2013, containing a nearly identical statement, and respectfully refer the Court to the May 9, 2013, letter from Defendant to Plaintiff as the best evidence of its contents.

21. Admit that EPA provides certain employees with personal digital assistants that have text messaging capability, and deny the remainder of the allegations in this paragraph.

22. This paragraph contains Plaintiff's characterization of various EPA and non-EPA documents discussing the management of federal records and contains legal conclusions to which no response is required. To the extent a response is required, Defendant respectfully refers the Court to the cited documents as the best evidence of their contents, and denies the remaining allegations in this paragraph.

23. This paragraph states conclusions of law to which no response is required.

24. This paragraph refers to the contents of EPA's FOIA regulations, to which no response is required. The Court is respectfully referred to the regulations as the best evidence of their contents.

25. This paragraph states conclusions of law to which no response is required.

26. This paragraph states a conclusion of law to which no response is required.

Defendant avers that EPA responded to Plaintiff's FOIA request on May 31, 2013.

27. This paragraph states a conclusion of law to which no response is required.

Defendant avers that EPA responded to Plaintiff's FOIA request on May 31, 2013.

28. Deny, and aver that EPA responded to Plaintiff's request on May 31, 2013.

29. This paragraph states conclusions of law to which no response is required. To the extent a response is deemed necessary, Defendant denies the allegations contained in this paragraph, and avers that EPA responded to Plaintiff's request on May 31, 2013.

30. This paragraph states conclusions of law to which no response is required. To the extent a response is deemed necessary, Defendant denies the allegations contained in this paragraph, and avers that EPA responded to Plaintiff's request on May 31, 2013.

31. Defendant reasserts its answers to Plaintiff's paragraphs numbered 1-30 above.

32. This paragraph states conclusions of law to which no response is required.

33. Admit that EPA has not located, and therefore, has not provided any records responsive to Plaintiff's request. Deny the remaining allegations in this paragraph, and aver that EPA responded to Plaintiff's FOIA request on May 31, 2013.

34. This paragraph states a conclusion of law to which no response is required.

35. This paragraph states a conclusion of law to which no response is required.

Defendant avers that EPA responded to Plaintiff's FOIA request on May 31, 2013.

36. This paragraph states a conclusion of law to which no response is required.

37. This paragraph states Plaintiff's statement of the relief it seeks to which no response is required. To the extent a response is deemed necessary, Defendant denies that Plaintiff is entitled to any relief.

38. Defendant reasserts its answers to Plaintiff's paragraphs numbered 1-37 above.

39. This paragraph states Plaintiff's statement of the relief it seeks to which no response is required. To the extent a response is deemed necessary, Defendant denies that Plaintiff is entitled to any relief.

40. This paragraph states Plaintiff's statement of the relief it seeks to which no response is required. To the extent a response is deemed necessary, Defendant denies that Plaintiff is entitled to any relief.

41. Defendant reasserts its answers to Plaintiff's paragraphs numbered 1-40 above.

42. This paragraph states a conclusion of law to which no response is required.

43. This paragraph states Plaintiff's statement of the relief it seeks to which no response is required. To the extent a response is deemed necessary, Defendant denies that Plaintiff is entitled to any relief.

44. This paragraph states a conclusion of law to which no response is required.

Defendant avers that EPA responded to Plaintiff's FOIA request on May 31, 2013, and denies that Plaintiff is entitled to any relief.

The remainder of the Complaint consists of Plaintiff's Request for Relief, to which no response is required. To the extent that a response is required, Defendant denies that Plaintiff is entitled to any of the relief requested in its "Wherefore" clause.

WHEREFORE, having fully answered, Defendant respectfully prays that Plaintiff's Complaint be dismissed with prejudice and judgment be entered in favor of the Defendant and requests such further relief as the Court deems appropriate. Each and every allegation not heretofore expressly admitted or denied is denied.

Date: July 19, 2013

Respectfully submitted,

RONALD C. MACHEN JR., D.C. Bar #447889  
United States Attorney  
for the District of Columbia

DANIEL F. VAN HORN, D.C. Bar #924092  
Chief, Civil Division

By: /s/ Michelle Lo  
MICHELLE LO  
Assistant United States Attorney  
555 4th Street, N.W.  
Washington, D.C. 20530  
Tel: (202) 252-2541 Fax: (202) 514-8780  
Michelle.Lo2@usdoj.gov

*Of counsel:*

Lynn Kelly  
Office of General Counsel  
U.S. Environmental Protection Agency



**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

COMPETITIVE ENTERPRISE INSTITUTE     )  
1899 L Street, N.W., 12<sup>th</sup> Floor         )  
Washington, D.C. 20036                 )

Plaintiff,                                     )

v.   )

Civil Action No. 13-

UNITED STATES ENVIRONMENTAL     )  
PROTECTION AGENCY                 )  
1200 Pennsylvania Avenue, N.W.     )  
Washington, D.C. 20460               )

Defendant.                                 )

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

Plaintiff COMPETITIVE ENTERPRISE INSTITUTE (“CEI”) for its complaint against Defendant UNITED STATES ENVIRONMENTAL PROTECTION AGENCY (“EPA” or “the Agency”), alleges as follows:

- 1) This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, to compel production under a FOIA request seeking certain EPA text message transcripts (“texts” or “text messages”).
- 2) On April 26, 2013, CEI submitted its request seeking those records, all of which which were created on an EPA-assigned personal digital assistant or personal data assistant (PDA), and sent or received by a senior EPA official, Assistant Administrator for Air and Radiation Gina McCarthy, on eighteen specified dates.
- 3) Defendant EPA has provided neither responsive records nor the substantive response required by statute.

- 4) Text messaging is used as an alternative medium of communication to electronic mail (email), and texting accounts are specifically provided to certain officials for the purpose of enabling performance of particular official functions.
- 5) These texts are “agency records” under federal record-keeping and disclosure laws. They are of significant public interest, especially due to EPA’s recurrent failure to produce text message transcripts in response to FOIA and congressional oversight requests.
- 6) Plaintiff CEI states on information and belief that Ms. McCarthy regularly used text messaging as an alternative to email for work-related communications, and that a senior Agency official cautioned McCarthy to cease using that function on her PDA, due to concerns about the propriety of her texting about Members of Congress specifically on days when she testified before either the House or Senate.
- 7) Compelling EPA to respond, whether by releasing responsive records, or issuing a “no records” response, will shed light on EPA’s recordkeeping practices and compliance with its legal obligations. Specifically, this will inform the public about why EPA has failed to produce this class of records in response to requests clearly seeking them, by indicating whether EPA has been preserving this class of records as required by law but simply not turning them over, or whether it is failing to preserve (*i.e.*, destroying) them, in violation of law and policy.
- 8) Since the text messages at issue were sent to and from the current nominee to be EPA’s new administrator (who was specifically charged by EPA with responsibility for ensuring its Air Office’s compliance with applicable recordkeeping law and

policy), these records, and whether Ms. McCarthy fulfilled her obligation to maintain and to produce them, are of significant public interest.

- 9) Despite this, and in the face of revelations about organized and systemic abuses by senior federal employees to hide from the public their activities, particularly their electronic communications, EPA has failed to provide the required response.

Accordingly, Plaintiff files this lawsuit to compel EPA to comply with the law.

### **PARTIES**

- 10) Plaintiff CEI is a public policy research and educational institute in Washington, D.C., dedicated to advancing responsible regulation and in particular economically sustainable environmental policy. CEI's programs include research, investigative journalism and publication, as well as a transparency initiative seeking public records relating to environmental policy and how policymakers use public resources.
- 11) Defendant EPA is a federal agency headquartered in Washington, D.C. whose stated mission is to "protect human health and the environment."

### **JURISDICTION AND VENUE**

- 12) This Court has jurisdiction pursuant to 5 U.S.C. § 552(a)(4)(B), because this action is brought in the District of Columbia, and 28 U.S.C. § 1331, because the resolution of disputes under FOIA presents a federal question.
- 13) Venue is proper in this Court under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e) because Plaintiff resides in the District of Columbia, and defendant EPA is a federal agency.

### **FURTHER FACTUAL BACKGROUND**

- 14) EPA has not provided any records, or substantive response, to CEI's FOIA request for Assistant Administration McCarthy's text messages. Nor has it sought or made the case for more time to respond, or for more information.
- 15) To date, Defendant EPA has only acknowledged receipt of the request, said it will respond to the request at some unspecified future time, and informed CEI that its request is "non-billable" under FOIA.<sup>1</sup> (Typically, FOIA requests are non-billable when they can be handled in two hours or less. *See* 5 U.S.C. § 552(a)(4)(A)(iv)).
- 16) Through its determination that the FOIA request was non-billable, the EPA effectively conceded that it was able to provide a substantive response to the FOIA request with minimal effort, yet it did not do so.
- 17) Transparency in government is the subject of high-profile vows by the president and attorney general that FOIA will "be administered with a clear presumption: In the face of doubt, openness prevails" (*See* Attorney General Eric Holder, *OIP Guidance, President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines, Creating a "New Era of Open Government"*, [www.justice.gov/oip/foiapost/2009foiapost8.htm](http://www.justice.gov/oip/foiapost/2009foiapost8.htm); *Memorandum for the Heads of Executive Departments*, [www.whitehouse.gov/the\\_press\\_office/Freedom\\_of\\_Information\\_Act](http://www.whitehouse.gov/the_press_office/Freedom_of_Information_Act).)

### **Plaintiff CEI's FOIA Request HQ-2013-006005 Seeking Certain Specified Text Messages of Gina McCarthy**

- 18) On April 26, 2013, CEI submitted a FOIA Request by electronic mail to [hq.foia@epa.gov](mailto:hq.foia@epa.gov), seeking (emphases in original)<sup>2</sup>:

---

<sup>1</sup> See *infra*, ¶ 20.

<sup>2</sup> This is the email address specified by the government for submission of FOIA requests such as CEI's.

copies of all text messages<sup>1</sup> sent by Assistant Administrator for Air and Radiation Gina McCarthy on a mobile telephone provided for her use by the Agency, on the following eighteen days:

**2009:** July 9, 2009; July 14, 2009

**2010:** July 22, 2010; March 4, 2010; March 24, 2010

**2011:** March 1, 2011; March 13, 2011; March 24, 2011; April 13, 2011; May 13, 2011; June 30, 2011; September 8, 2011; September 15, 2011; October 12, 2011; October 25, 2011

**2012:** February 28, 2012; June 19, 2012; June 29, 2012.

**Defendant's Response to Plaintiff's FOIA Request**

- 19) EPA assigned this request identification number EPA-HQ-2013-006005 by letter dated and sent by electronic mail on May 9, 2013.
- 20) This letter stated in pertinent part, "The Office of the Administrator will be responding to your request, your request did not reach the billable amount."<sup>3</sup>

**LEGAL ARGUMENTS**

**Text Messages are "Agency Records" Under Federal Record-Keeping and Disclosure Laws, and EPA's Implementing Policies**

- 21) EPA provides certain employees with PDAs and text messaging capability as an option to email for official or otherwise work-related internal or external communications.
- 22) Text messaging correspondence are agency records and must be maintained and produced as such. *See, e.g.,* National Archives, *Frequently Asked Questions About Instant Messaging*, <http://www.archives.gov/records-mgmt/initiatives/im-faq.html>

---

<sup>3</sup> See May 9, 2013 letter from National FOIA Officer Larry Gottesman to CEI counsel Christopher Horner.

(Instant Messaging (IM) content can “qualify as a Federal Record,” since IM “allows users” to “exchange text messages,” which are “machine readable materials” and thus within the “statutory definition of records”); *Frequent Questions about E-Mail and Records*, <http://www.epa.gov/records/faqs/email.htm>; *Frequent Questions about Mobile and Portable Devices, and Records*, [www.epa.gov/records/faqs/pda.htm](http://www.epa.gov/records/faqs/pda.htm); *Memo to All Staff, “Transparency at EPA,”* by Acting Administrator Bob Perciasepe, dated April 8, 2013 (“the Inspector General currently is conducting an audit of the agency’s records management practices and procedures. We have suggested they place focus on electronic records including email and instant messaging. While we have made progress in these areas, we are committed to addressing any concerns or weaknesses that are identified in this audit . . . to strengthen our records management system”).<sup>4</sup>

**Defendant EPA Owed and Has Failed to Provide Plaintiff a Meaningful, Productive Response to its Request**

23) FOIA provides that a requesting party is entitled to a substantive agency response within twenty working days, affirming the agency is processing the request and intends to comply. It must rise to the level of indicating “that the agency is exercising due diligence in responding to the request...Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request.” (5 U.S.C. § 552(a)(6)(C)(i)). Alternatively, the agency must cite “exceptional circumstances” and request, and make the case for, an

---

<sup>4</sup> See also April 11, 2008 memorandum from John B. Ellis, EPA, to Paul Wester, National Archives and Records Administration, at 4 (reporting discovery of record-keeping problems); *Records and ECMS Briefing, EPA Incoming Political Appointees 2009*, [http://www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore\\_id=60afa4b3-3e5d-4e6f-b81e-64998f0d3c67](http://www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=60afa4b3-3e5d-4e6f-b81e-64998f0d3c67).

extension that is necessary and proper to the specific request. *See, e.g., Buc v. FDA*, 762 F.Supp.2d 62, 67-73 (D.D.C. 2011).

- 24) EPA regulations state, *inter alia*, “(a) Unless the Agency and the requester have agreed otherwise, or when unusual circumstances exist as provided in paragraph (e) of this section, EPA offices will respond to requests no later than 20 working days from the date the request is received and logged in by the appropriate FOI Office. EPA will ordinarily respond to requests in the order in which they were received. If EPA fails to respond to your request within the 20 working day period, or any authorized extension of time, you may seek judicial review to obtain the records without first making an administrative appeal.” 40 C.F.R. § 2.104..
- 25) Within 20 working days EPA must at least have informed the requesting party of the scope of potentially responsive records, including the scope of the records it plans to produce and the scope of documents that it plans to withhold under any FOIA exemptions. *See Citizens for Responsible Ethics in Washington v. Federal Election Commission*, 711 F.3d 180, 186 (D.C. Cir. 2013)(“CREW”). That information should include an estimated schedule for completion of the production. *See* 5 U.S.C. § 552(a)(6)(A)(i); *Muttitt v. U.S. Central Command*, 813 F. Supp. 2d 221, 227 (D.D.C. 2011) (addressing “the statutory requirement that [agencies] provide estimated dates of completion”).
- 26) FOIA specifically requires EPA to have, by this time, provided CEI with a particularized and substantive determination, including its reasoning, as well as notice of CEI’s right to appeal. *See CREW*, 711 F.3d at 186.
- 27) EPA owed CEI a substantive response to its request by May 24, 2013.

- 28) After acknowledging CEI's request, EPA did not substantively respond, or order production of responsive records, or indicate that a certain quantity of records was being reviewed with an eye toward production on some estimated schedule. Nor has it sought and made its case for an extension of time to respond to the request as required when "exceptional circumstances" exist.

**Having Failed to Properly Respond to Plaintiff's Request, Defendant EPA Owes Plaintiff Responsive Records**

- 29) In short, EPA has provided no responsive records or substantive response to CEI. Due to this failure to substantively respond to CEI's request, CEI need not administratively appeal, but instead may seek relief from this Court, under well-established precedent.
- 30) Thus, EPA is now legally required to provide CEI records responsive to its request.

**FIRST CLAIM FOR RELIEF**

**Duty to Release Certain Described Text Messages -- Declaratory Judgment**

- 31) Plaintiff re-alleges paragraphs 1-30 as if fully set out herein.
- 32) FOIA requires all doubts to be resolved in favor of disclosure. It allows the citizenry to learn "what their government is up to." *NRA v. Favish* 541 U.S. 157, 171 (quoting *U.S. Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 773 (1989)). The act is designed to "pierce the veil of administrative secrecy and to open agency action to the light of scrutiny." *Dep't of the Air Force v. Rose*, 425 U.S. 352 (1976). It is a transparency-forcing law, consistent with "the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Id.*
- 33) Plaintiff has sought and been denied production of responsive records reflecting the conduct of official business.



- 34) Plaintiff has a statutory right to the information it seeks.
- 35) EPA failed to provide Plaintiff responsive records or a substantive response.
- 36) CEI has exhausted its administrative remedies.
- 37) CEI asks this Court to enter a judgment declaring that
  - i. The EPA text message records described in Plaintiff's request No. HQ-2013-006005, and any attachments thereto, are public records, and as such, are subject to release under FOIA;
  - ii. EPA must release those requested records;
  - iii. EPA's denial of CEI's FOIA request is not reasonable, and does not satisfy EPA's obligations under FOIA; and
  - iv. EPA's refusal to produce the requested records is unlawful.

### **SECOND CLAIM FOR RELIEF**

#### **Release of Certain Described Text Messages -- Injunctive Relief**

- 38) Plaintiff re-alleges paragraphs 1-37 as if fully set out herein.
- 39) CEI is entitled to injunctive relief compelling EPA to produce all records in its possession responsive to CEI's FOIA request.
- 40) This Court should enter an injunction ordering EPA to produce to CEI within 10 business days of the date of the order, the requested "text" records described in Plaintiff's request No. HQ-2013-006005, and any attachments thereto.

### **THIRD CLAIM FOR RELIEF**

#### **Costs And Fees – Injunctive Relief**

- 41) Plaintiff re-alleges paragraphs 1-40 as if fully set out herein.
- 42) Pursuant to 5 U.S.C. § 552(a)(4)(E), the Court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.
- 43) This Court should enter an injunction ordering the Defendant to pay reasonable attorney fees and other litigation costs reasonably incurred in this case.

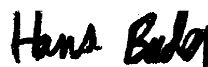
44) CEI has a statutory right to the records that it seeks, EPA has not fulfilled its statutory obligations to provide the records or a substantive response, and there is no legal basis for withholding the records.

WHEREFORE, Plaintiff requests the declaratory and injunctive relief herein sought, and an award for its attorney fees and costs and such other and further relief as the Court shall deem proper.

Respectfully submitted this 29<sup>th</sup> day of May, 2013,



Christopher C. Horner  
D.C. Bar No. 440107  
1899 L Street, NW, 12<sup>th</sup> Floor  
Washington, D.C. 20036  
(202) 262-4458  
[chris.horner@cei.org](mailto:chris.horner@cei.org)



Hans Bader, D.C. Bar No. 466545  
Sam Kazman, D.C. Bar No. 946376  
Competitive Enterprise Institute  
1899 L St., N.W., 12<sup>th</sup> Floor  
Washington, D.C. 20036  
(202) 331-2278, [hbader@cei.org](mailto:hbader@cei.org)  
Attorneys for Plaintiff

## CIVIL COVER SHEET

JS-44 (Rev. 3/13 DC)

<b>I. (a) PLAINTIFFS</b> COMPETITIVE ENTERPRISE INSTITUTE  (b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF <u>Wash., DC</u> (EXCEPT IN U.S. PLAINTIFF CASES)	<b>DEFENDANTS</b> UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT <u>Washington DC</u> (IN U.S. PLAINTIFF CASES ONLY) <small>NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED</small>
(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER) Hans Bader & Christopher C. Horner Competitive Enterprise Institute 1899 L Street, NW, 12th Floor, Washington, D.C. 20036 (202) 331-2278	ATTORNEYS (IF KNOWN)

<b>II. BASIS OF JURISDICTION</b> (PLACE AN x IN ONE BOX ONLY)	<b>III. CITIZENSHIP OF PRINCIPAL PARTIES</b> (PLACE AN x IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT) <b>FOR DIVERSITY CASES ONLY!</b>																								
<div style="display: flex; justify-content: space-between;"> <div> <input type="radio"/> 1 U.S. Government Plaintiff         </div> <div> <input type="radio"/> 3 Federal Question (U.S. Government Not a Party)         </div> </div> <div style="display: flex; justify-content: space-between; margin-top: 10px;"> <div> <input checked="" type="radio"/> 2 U.S. Government Defendant         </div> <div> <input type="radio"/> 4 Diversity (Indicate Citizenship of Parties in item III)         </div> </div>	<table style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th></th> <th style="text-align: center;">PTF</th> <th style="text-align: center;">DFT</th> <th></th> <th style="text-align: center;">PTF</th> <th style="text-align: center;">DFT</th> </tr> </thead> <tbody> <tr> <td>Citizen of this State</td> <td style="text-align: center;"><input type="radio"/> 1</td> <td style="text-align: center;"><input type="radio"/> 1</td> <td>Incorporated or Principal Place of Business in This State</td> <td style="text-align: center;"><input type="radio"/> 4</td> <td style="text-align: center;"><input type="radio"/> 4</td> </tr> <tr> <td>Citizen of Another State</td> <td style="text-align: center;"><input type="radio"/> 2</td> <td style="text-align: center;"><input type="radio"/> 2</td> <td>Incorporated and Principal Place of Business in Another State</td> <td style="text-align: center;"><input type="radio"/> 5</td> <td style="text-align: center;"><input type="radio"/> 5</td> </tr> <tr> <td>Citizen or Subject of a Foreign Country</td> <td style="text-align: center;"><input type="radio"/> 3</td> <td style="text-align: center;"><input type="radio"/> 3</td> <td>Foreign Nation</td> <td style="text-align: center;"><input type="radio"/> 6</td> <td style="text-align: center;"><input type="radio"/> 6</td> </tr> </tbody> </table>		PTF	DFT		PTF	DFT	Citizen of this State	<input type="radio"/> 1	<input type="radio"/> 1	Incorporated or Principal Place of Business in This State	<input type="radio"/> 4	<input type="radio"/> 4	Citizen of Another State	<input type="radio"/> 2	<input type="radio"/> 2	Incorporated and Principal Place of Business in Another State	<input type="radio"/> 5	<input type="radio"/> 5	Citizen or Subject of a Foreign Country	<input type="radio"/> 3	<input type="radio"/> 3	Foreign Nation	<input type="radio"/> 6	<input type="radio"/> 6
	PTF	DFT		PTF	DFT																				
Citizen of this State	<input type="radio"/> 1	<input type="radio"/> 1	Incorporated or Principal Place of Business in This State	<input type="radio"/> 4	<input type="radio"/> 4																				
Citizen of Another State	<input type="radio"/> 2	<input type="radio"/> 2	Incorporated and Principal Place of Business in Another State	<input type="radio"/> 5	<input type="radio"/> 5																				
Citizen or Subject of a Foreign Country	<input type="radio"/> 3	<input type="radio"/> 3	Foreign Nation	<input type="radio"/> 6	<input type="radio"/> 6																				

## IV. CASE ASSIGNMENT AND NATURE OF SUIT

(Place an X in one category, A-N, that best represents your Cause of Action and one in a corresponding Nature of Suit)

<input type="radio"/> <b>A. Antitrust</b>  <input type="checkbox"/> 410 Antitrust	<input type="radio"/> <b>B. Personal Injury/Malpractice</b>  <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Medical Malpractice <input type="checkbox"/> 365 Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Product Liability	<input type="radio"/> <b>C. Administrative Agency Review</b>  <input type="checkbox"/> 151 Medicare Act  <b>Social Security</b> <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) <b>Other Statutes</b> <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 890 Other Statutory Actions (If Administrative Agency is Involved)	<input type="radio"/> <b>D. Temporary Restraining Order/Preliminary Injunction</b>  Any nature of suit from any category may be selected for this category of case assignment.  *(If Antitrust, then A governs)*
<input type="radio"/> <b>E. General Civil (Other)</b> <b>OR</b> <input type="radio"/> <b>F. Pro Se General Civil</b>			
<b>Real Property</b> <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent, Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property  <b>Personal Property</b> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<b>Bankruptcy</b> <input type="checkbox"/> 422 Appeal 27 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157  <b>Prisoner Petitions</b> <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Conditions <input type="checkbox"/> 560 Civil Detainee – Conditions of Confinement  <b>Property Rights</b> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark  <b>Federal Tax Suits</b> <input type="checkbox"/> 870 Taxes (US plaintiff or defendant) <input type="checkbox"/> 871 IRS-Third Party 26 USC 7609	<b>Forfeiture/Penalty</b> <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other  <b>Other Statutes</b> <input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 430 Banks & Banking <input type="checkbox"/> 450 Commerce/ICC Rates/etc. <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions <input type="checkbox"/> 470 Racketeer Influenced & Corrupt Organization	<input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Satellite TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes <input type="checkbox"/> 890 Other Statutory Actions (if not administrative agency review or Privacy Act)

<input type="radio"/> <b>G. Habeas Corpus/ 2255</b>  <input type="checkbox"/> 530 Habeas Corpus – General <input type="checkbox"/> 510 Motion/Vacate Sentence <input type="checkbox"/> 463 Habeas Corpus – Alien Detainee	<input type="radio"/> <b>H. Employment Discrimination</b>  <input type="checkbox"/> 442 Civil Rights – Employment (criteria: race, gender/sex, national origin, discrimination, disability, age, religion, retaliation)  <i>*(If pro se, select this deck)*</i>	<input type="radio"/> <b>I. FOIA/Privacy Act</b>  <input checked="" type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 890 Other Statutory Actions (if Privacy Act)  <i>*(If pro se, select this deck)*</i>	<input type="radio"/> <b>J. Student Loan</b>  <input type="checkbox"/> 152 Recovery of Defaulted Student Loan (excluding veterans)
<input type="radio"/> <b>K. Labor/ERISA (non-employment)</b>  <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 740 Labor Railway Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	<input type="radio"/> <b>L. Other Civil Rights (non-employment)</b>  <input type="checkbox"/> 441 Voting (if not Voting Rights Act) <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 445 Americans w/Disabilities – Employment <input type="checkbox"/> 446 Americans w/Disabilities – Other <input type="checkbox"/> 448 Education	<input type="radio"/> <b>M. Contract</b>  <input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholder's Suits <input type="checkbox"/> 190 Other Contracts <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<input type="radio"/> <b>N. Three-Judge Court</b>  <input type="checkbox"/> 441 Civil Rights – Voting (if Voting Rights Act)

**V. ORIGIN**  
☒ 1 Original Proceeding  
 ☐ 2 Remand from State Court  
 ☐ 3 Remanded from Appellate Court  
 ☐ 4 Reinstated or Reopened  
 ☐ 5 Transferred from another district (specify)  
 ☐ 6 Multi-district Litigation  
 ☐ 7 Appeal to District Judge from Mag. Judge

**VI. CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE.)**  
 5 U.S.C. § 552 (refusal to comply with Freedom of Information Act request)

<b>VII. REQUESTED IN COMPLAINT</b>	CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 <input type="checkbox"/>	DEMAND \$ _____	JURY DEMAND: YES <input type="checkbox"/> NO <input checked="" type="checkbox"/>
<b>VIII. RELATED CASE(S) IF ANY</b>	(See instruction)	YES <input type="checkbox"/> NO <input checked="" type="checkbox"/>	If yes, please complete related case form

DATE: 5/29/2013	SIGNATURE OF ATTORNEY OF RECORD: <u>Harold Baker</u>
-----------------	--

**INSTRUCTIONS FOR COMPLETING CIVIL COVER SHEET JS-44**  
 Authority for Civil Cover Sheet

The JS-44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and services of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. Listed below are tips for completing the civil cover sheet. These tips coincide with the Roman Numerals on the cover sheet.

- I.** COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF/DEFENDANT (b) County of residence: Use 11001 to indicate plaintiff if resident of Washington, DC, 88888 if plaintiff is resident of United States but not Washington, DC, and 99999 if plaintiff is outside the United States.
- III.** CITIZENSHIP OF PRINCIPAL PARTIES: This section is completed only if diversity of citizenship was selected as the Basis of Jurisdiction under Section II.
- IV.** CASE ASSIGNMENT AND NATURE OF SUIT: The assignment of a judge to your case will depend on the category you select that best represents the primary cause of action found in your complaint. You may select only one category. You must also select one corresponding nature of suit found under the category of the case.
- VI.** CAUSE OF ACTION: Cite the U.S. Civil Statute under which you are filing and write a brief statement of the primary cause.
- VIII.** RELATED CASE(S), IF ANY: If you indicated that there is a related case, you must complete a related case form, which may be obtained from the Clerk's Office.

Because of the need for accurate and complete information, you should ensure the accuracy of the information provided prior to signing the form.

---

---

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

COMPETITIVE ENTERPRISE INSTITUTE

*Plaintiff*

v.

United States Environmental Protection Agency

*Defendant*

)  
)  
)  
)  
)  
)  
)

Civil Action No. 13-779

**SUMMONS IN A CIVIL ACTION**

To: *(Defendant's name and address)*

U.S. Attorney for the District of Columbia  
Attn: Civil Process Clerk.  
501 3rd Street, NW, 4th Floor  
Washington, D.C. 20530

A lawsuit has been filed against you.

Within 30 days after service of this summons on you (not counting the day you received it) you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Christopher C. Horner & Hans Bader  
Competitive Enterprise Institute  
1899 L Street, NW, 12th Floor  
Washington, D.C. 20036

If you fail to respond, judgment by default may be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

*ANGELA D. CAESAR, CLERK OF COURT*

Date: \_\_\_\_\_

\_\_\_\_\_  
*Signature of Clerk or Deputy Clerk*

Civil Action No. 13-779

**PROOF OF SERVICE***(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))*

This summons for *(name of individual and title if any)* \_\_\_\_\_  
 was received by me on *(date)* \_\_\_\_\_.

☐ I personally served the summons on the individual at *(place)* \_\_\_\_\_  
 \_\_\_\_\_ on *(date)* \_\_\_\_\_; or

☐ I left the summons at the individual's residence or usual place of abode with *(name)* \_\_\_\_\_  
 \_\_\_\_\_, a person of suitable age and discretion who resides there,  
 on *(date)* \_\_\_\_\_, and mailed a copy to the individual's last known address; or

☐ I served the summons on *(name of individual)* \_\_\_\_\_, who is  
 designated by law to accept service of process on behalf of *(name of organization)* \_\_\_\_\_  
 \_\_\_\_\_ on *(date)* \_\_\_\_\_; or

☐ I returned the summons unexecuted because \_\_\_\_\_; or

☐ Other *(specify)*: \_\_\_\_\_.

My fees are \$ \_\_\_\_\_ for travel and \$ \_\_\_\_\_ for services, for a total of \$ \_\_\_\_\_ 0.00.

I declare under penalty of perjury that this information is true.

Date: \_\_\_\_\_

\_\_\_\_\_  
*Server's signature*

\_\_\_\_\_  
*Printed name and title*

\_\_\_\_\_  
*Server's address*

Additional information regarding attempted service, etc:

---

---

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

COMPETITIVE ENTERPRISE INSTITUTE

*Plaintiff*

v.

United States Environmental Protection Agency

*Defendant*

)  
)  
)  
)  
)  
)  
)

Civil Action No. 13-779

**SUMMONS IN A CIVIL ACTION**

To: *(Defendant's name and address)*

United States Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Ariel Rios Building  
Washington, D.C. 20460

A lawsuit has been filed against you.

Within 30 days after service of this summons on you (not counting the day you received it) you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Christopher C. Horner & Hans Bader  
Competitive Enterprise Institute  
1899 L Street, NW, 12th Floor  
Washington, D.C. 20036

If you fail to respond, judgment by default may be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

*ANGELA D. CAESAR, CLERK OF COURT*

Date: \_\_\_\_\_

\_\_\_\_\_  
*Signature of Clerk or Deputy Clerk*

Civil Action No. 13-779

**PROOF OF SERVICE***(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))*

This summons for *(name of individual and title if any)* \_\_\_\_\_  
 was received by me on *(date)* \_\_\_\_\_.

☐ I personally served the summons on the individual at *(place)* \_\_\_\_\_  
 \_\_\_\_\_ on *(date)* \_\_\_\_\_; or

☐ I left the summons at the individual's residence or usual place of abode with *(name)* \_\_\_\_\_  
 \_\_\_\_\_, a person of suitable age and discretion who resides there,  
 on *(date)* \_\_\_\_\_, and mailed a copy to the individual's last known address; or

☐ I served the summons on *(name of individual)* \_\_\_\_\_, who is  
 designated by law to accept service of process on behalf of *(name of organization)* \_\_\_\_\_  
 \_\_\_\_\_ on *(date)* \_\_\_\_\_; or

☐ I returned the summons unexecuted because \_\_\_\_\_; or

☐ Other *(specify)*: \_\_\_\_\_.

My fees are \$ \_\_\_\_\_ for travel and \$ \_\_\_\_\_ for services, for a total of \$ \_\_\_\_\_ 0.00.

I declare under penalty of perjury that this information is true.

Date: \_\_\_\_\_

\_\_\_\_\_  
*Server's signature*

\_\_\_\_\_  
*Printed name and title*

\_\_\_\_\_  
*Server's address*

Additional information regarding attempted service, etc:



---

---

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

COMPETITIVE ENTERPRISE INSTITUTE

*Plaintiff*

v.

United States Environmental Protection Agency

*Defendant*

)  
)  
)  
)  
)  
)  
)

Civil Action No. 13-779

**SUMMONS IN A CIVIL ACTION**

To: *(Defendant's name and address)*

Attorney General Eric Holder  
950 Pennsylvania Ave., NW, Room 511  
Washington, D.C. 20530

A lawsuit has been filed against you.

Within 30 days after service of this summons on you (not counting the day you received it) you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Christopher C. Horner & Hans Bader  
Competitive Enterprise Institute  
1899 L Street, NW, 12th Floor  
Washington, D.C. 20036

If you fail to respond, judgment by default may be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

*ANGELA D. CAESAR, CLERK OF COURT*

Date: \_\_\_\_\_

\_\_\_\_\_  
*Signature of Clerk or Deputy Clerk*

Civil Action No. 13-779

**PROOF OF SERVICE***(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))*

This summons for *(name of individual and title if any)* \_\_\_\_\_  
 was received by me on *(date)* \_\_\_\_\_.

☐ I personally served the summons on the individual at *(place)* \_\_\_\_\_  
 \_\_\_\_\_ on *(date)* \_\_\_\_\_; or

☐ I left the summons at the individual's residence or usual place of abode with *(name)* \_\_\_\_\_  
 \_\_\_\_\_, a person of suitable age and discretion who resides there,  
 on *(date)* \_\_\_\_\_, and mailed a copy to the individual's last known address; or

☐ I served the summons on *(name of individual)* \_\_\_\_\_, who is  
 designated by law to accept service of process on behalf of *(name of organization)* \_\_\_\_\_  
 \_\_\_\_\_ on *(date)* \_\_\_\_\_; or

☐ I returned the summons unexecuted because \_\_\_\_\_; or

☐ Other *(specify)*: \_\_\_\_\_.

My fees are \$ \_\_\_\_\_ for travel and \$ \_\_\_\_\_ for services, for a total of \$ \_\_\_\_\_ 0.00.

I declare under penalty of perjury that this information is true.

Date: \_\_\_\_\_

\_\_\_\_\_  
*Server's signature*

\_\_\_\_\_  
*Printed name and title*

\_\_\_\_\_  
*Server's address*

Additional information regarding attempted service, etc:

**From:** [Miller, Kevin](#)  
**To:** [McDermott, Marna](#)  
**Subject:** FW: draft clarification letter latest version  
**Date:** Wednesday, July 03, 2013 2:14:50 PM  
**Attachments:** [Clarification Letter billing 3.docx](#) (b) (5) DPP  
**Importance:** High

---

Marna,

Can you let Kevin know that Ketcham-Colwill is waiting on comments from him on this. It has to go out today.

Kevin Miller | US EPA | Office of General Counsel | 1200 Pennsylvania Ave., NW | ARN, Mail Code 2377A | Washington DC 20460 | phone: (202) 564-2691

---

**From:** Weinstock, Larry  
**Sent:** Wednesday, July 03, 2013 11:34 AM  
**To:** Miller, Kevin; Ketcham-Colwill, Nancy; Minoli, Kevin  
**Cc:** Goffman, Joseph  
**Subject:** RE: draft clarification letter latest version  
**Importance:** High

Here is the latest version of the letter– which we would like to send off today. (b) (5) DPP, (b) (5) ACP

[REDACTED]

[REDACTED]

Is that a problem?

(b) (5) DPP, (b) (5) ACP ?

Thanks  
Larry

---

**From:** Miller, Kevin  
**Sent:** Wednesday, July 03, 2013 9:50 AM  
**To:** Weinstock, Larry; Ketcham-Colwill, Nancy; Minoli, Kevin  
**Cc:** Goffman, Joseph  
**Subject:** RE: draft clarification letter

(b) (5) DPP, (b) (5) ACP

[REDACTED]

Kevin Miller | US EPA | Office of General Counsel | 1200 Pennsylvania Ave., NW | ARN, Mail Code 2377A | Washington DC 20460 | phone: (202) 564-2691

---

**From:** Weinstock, Larry

**Sent:** Wednesday, July 03, 2013 9:12 AM  
**To:** Ketcham-Colwill, Nancy; Miller, Kevin; Minoli, Kevin  
**Cc:** Goffman, Joseph  
**Subject:** RE: draft clarification letter

(b) (5) DPP, (b) (5) ACP  
[Redacted]  
[Redacted]  
[Redacted]

Larry

---

**From:** Ketcham-Colwill, Nancy  
**Sent:** Tuesday, July 02, 2013 7:42 PM  
**To:** Weinstock, Larry; Miller, Kevin; Minoli, Kevin  
**Cc:** Goffman, Joseph  
**Subject:** draft clarification letter

Thanks to Larry for developing the first draft of this letter to CEI seeking clarification of the request re the phone bills. (b) (5) DPP, (b) (5) ACP  
[Redacted]  
[Redacted]  
[Redacted]  
[Redacted]  
[Redacted]?

All other edits, suggestions welcome. We're planning to send this by COB 7/3.

Not Responsive

Not Responsive

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

Not Responsive

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

**FRIDAY REPORT CALENDAR FORECAST – 12/6/13 to 12/20/13**

Upcoming deadlines, meetings, and events identified by Regulatory Review Agendas

# Not Responsive

# Not Responsive





# Not Responsive

	12/17	GLO	Motion for Summary Judgment – <u>CEI v. EPA</u> – FOIA for bills for Gina McCarthy text messages for 3 year period ( <i>Anderson</i> )
--	-------	-----	--

# Not Responsive

\* Issues identified by law offices as likely to generate press or congressional interest.

**From:** [McDermott, Marna](#)  
**To:** [Kelly, Lynn](#)  
**Subject:** Fw: New FOAI Assignment (EPA-HQ-2014-002006)  
**Date:** Tuesday, December 31, 2013 5:15:47 PM  
**Attachments:** [Attachment for EPA-HQ-2014-002006.pdf](#)

---

Looks like the same one you mentioned earlier.

Marna McDermott

202 564 2890

---

**From:** Weinstock, Larry  
**Sent:** Tuesday, December 31, 2013 2:54:56 PM  
**To:** Anderson, Cindy; Newton, Jonathan  
**Cc:** No, Fredrick; Miller, Kevin; McDermott, Marna; Minoli, Kevin  
**Subject:** FW: New FOAI Assignment (EPA-HQ-2014-002006)

This is Chris Horner's follow-up from the Gina text bill. He is asking for all the text messages from:

- 1) Joe Goffman, Senior Counsel OAR
- 2) Janet McCabe
- 3) Margo Oge, OTAQ (retired late 2012)
- 4) Cindy Huang, Staff Assistant To the Assistant Administrator
- 5) **Scott Fulton, former EPA General Counsel**
- 6) Steve Page, Director, OAQPS, Research Triangle Park (RTP)
- 7) Peter Tsirigotis, Director, Sector Policies and Programs Division, OAR:OAQPS, RTP
- 8) Mike Flynn, Director, Office of Radiation and Indoor Air, EPA HQ
- 9) **Bob Perciasepe**
- 10) Curt Spalding, Regional Administrator EPA Region
- 11) Nancy Grantham, Director, EPA RI, Office of Public Affairs
- 12) Ira W. Leighton, former deputy RA, Region

He wants all messages from June 2009 until the date of the search. (b) (5) DPP

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Thanks

Larry Weinstock

Program Innovation Coordinator

Office of Air and Radiation

202-564-9226

**From:** [McDermott, Marna](#)  
**To:** [Miller, Kevin](#); [Kelly, Lynn](#)  
**Subject:** RE: CEI v. EPA, 13-0779 (BAH)  
**Date:** Friday, September 06, 2013 11:42:00 AM

---

(b) (5) DPP, (b) (5) ACP, (b) (5) AWP

Marna McDermott  
Associate Deputy General Counsel  
U.S. Environmental Protection Agency  
(202) 564-2890

---

**From:** Miller, Kevin  
**Sent:** Friday, September 06, 2013 11:34 AM  
**To:** Kelly, Lynn; McDermott, Marna  
**Subject:** RE: CEI v. EPA, 13-0779 (BAH)

(b) (5) DPP, (b) (5) ACP, (b) (5) AWP

Kevin Miller | US EPA | Office of General Counsel | 1200 Pennsylvania Ave., NW | WJC North, Mail Code 2377A | Washington DC 20460 | phone: (202) 564-2691

---

**From:** Kelly, Lynn  
**Sent:** Friday, September 06, 2013 11:15 AM  
**To:** McDermott, Marna  
**Cc:** Miller, Kevin  
**Subject:** FW: CEI v. EPA, 13-0779 (BAH)

(b) (5) DPP, (b) (5) ACP, (b) (5) AWP

Thanks for your assistance,

Lynn Kelly | US EPA | Office of General Counsel | 1200 Pennsylvania Ave., NW | WJC North, Mail Code 2377A | Washington DC 20460 | phone: (202) 564-3266

The contents of this e-mail and any attachments to it may contain deliberative-process, attorney-client, attorney work product, or otherwise privileged material. If you are not the intended recipient, or believe you have received this communication in error, please delete the copy you received, and do not print, copy, retransmit, disseminate, or otherwise use the information. Thank you.

---

**From:** Lo, Michelle (USADC) [<mailto:Michelle.Lo2@usdoj.gov>]  
**Sent:** Friday, September 06, 2013 11:08 AM  
**To:** Kelly, Lynn  
**Subject:** RE: CEI v. EPA, 13-0779 (BAH)

(b) (5) DPP, (b) (5) ACP, (b) (5) AWP

(b) (5) DPP, (b) (5) ACP, (b) (5) AWP

---

**From:** Lo, Michelle (USADC)  
**Sent:** Friday, August 02, 2013 9:36 AM  
**To:** Kelly, Lynn ([Kelly.Lynn@epa.gov](mailto:Kelly.Lynn@epa.gov))  
**Subject:** FW: CEI v. EPA, 13-0779 (BAH)

**From:** [chornerlaw@aol.com](mailto:chornerlaw@aol.com) [<mailto:chornerlaw@aol.com>]  
**Sent:** Thursday, August 01, 2013 10:05 PM  
**To:** Lo, Michelle (USADC); [hbader@cei.org](mailto:hbader@cei.org)  
**Cc:** [skazman@cei.org](mailto:skazman@cei.org)  
**Subject:** RE: CEI v. EPA, 13-0779 (BAH)

Dear Michelle,

Rather than endless rounds of clarification, though we have only sought one clear statement, I \*think\* you may just clarified the ambiguity as explained below. But if you plainly state what is implied we can dismiss.

Below you more strongly imply what seemed the implication before, but is still not stated outright with no room for misunderstanding. That is that Ms. McCarthy \*only\* used the texting function on her EPA phone for personal messages; and because she never used it for work this is why EPA has preserved none of her texts.

If that is what you were saying, would you please confirm that and that this is also EPA's position. In that case, you need not take any further questions to EPA and I accept the 'no records' response as sufficient such that we will dismiss.

I look forward to your reply.

Best,  
Chris

Sent from my Verizon Wireless 4G LTE smartphone

"Lo, Michelle (USADC)" wrote:

Chris,

I will take your request back to the agency, but I would like to be clear in what I will be communicating to the agency. The Agency has already explained that Ms. McCarthy uses text messaging for family and other personal business, not government business and that, because personal text messages are unrelated to Agency business, they were not required to be preserved by the Agency. I am not sure how you read this statement to mean that Ms. McCarthy uses the

texting function for EPA business. As I explained to Hans, this FOIA request deals with text messages on 18 specific dates, and we have already provided a very clear explanation for the “no records” response.

If what you are asking is – did Ms. McCarthy send ever any text messages that were work-related – I can ask the EPA if it would be willing to respond to this question even though it is well outside the scope of the FOIA request and does not alter the fact that the EPA did not locate any text messages on the 18 specific dates. If the EPA is willing to respond to the question of whether Ms. McCarthy ever sent any text messages that were work-related, can you represent that you will dismiss this case? As much as I think briefing would be an unnecessary use of the Court’s and the parties’ resources, it may be that we end up having to brief this matter rather than engage in endless rounds of clarification.

Best,  
Michelle

**From:** Chris Horner [<mailto:chornerlaw@aol.com>]  
**Sent:** Thursday, August 01, 2013 6:41 PM  
**To:** [HBader@cei.org](mailto:HBader@cei.org); Lo, Michelle (USADC)  
**Cc:** [SKazman@cei.org](mailto:SKazman@cei.org)  
**Subject:** Re: CEI v. EPA, 13-0779 (BAH)

Dera Michelle,

Please consider the following, in addition to what Hans has written you.

EPA’s obligation is to *demonstrate* ‘no records’. So far they have stated it. Demonstration is found in the bills for her device.

We have obtained what EPA claims to be the relevant (texting) portions of those bills, showing extensive texting activity, so extensive that it is thoroughly implausible that Ms. McCarthy didn’t text on those dates.

After we calculated the probability (1 in 7.9 sextillion), we received your statement on EPA’s behalf including the portion that is the basis for the ambiguity that Hans refers to and under which we cannot dismiss, but possibly can if you clarify what it is saying:

Ms. McCarthy uses text messaging to communicate with her family. Ms. McCarthy uses email for government business, and text messaging for family and other personal business. These personal text messages are unrelated to Agency business, and thus were not required to be preserved by the Agency.

To me this plainly implied that EPA’s position is that Ms. McCarthy uses email for work and the text messaging function *only* for personal messages, and therefore EPA has not preserved her text messaging. If that is the case, and EPA state it, then the ‘no records’ response is sufficient and we can, I believe, dismiss.

However, another of us suggested that in context it implies something materially different, that while Ms. McCarthy uses the texting function for EPA business, on the 18 dates at issue in this matter all texts sent or received by Ms. McCarthy were personal, which is why those specific text messages are not preserved. We have not had our stats people run the probability of that but I suggest it is for all practical purposes the same as the idea that she did not text on those 18 dates.

Regardless, it may imply both but we cannot reasonably discern which, and so we ask you to state which is EPA’s assertion. This is material because of EPA’s obligation to demonstrate, and the sole (and most reasonable) demonstration -- her phone bills -- indicating that one of these readings is implausible, and under that

reading therefore so is the 'no records' claim. The other reading is more plausible and makes the 'no records' response plausible.

So, we simply would like clarification of the ambiguous statement: over the period in question, did EPA preserve some of Ms. McCarthy's text messages -- those that someone determined were work-related -- or did they preserve none of them because they were all personal?

If we have a clear answer to this then depending on that clarification we can possibly dismiss, or we know we cannot justify doing so. We also cannot justify doing so in the absence of a clarification of an ambiguous assertion. Clarifying it is of course much simpler than further litigating this if that clarification would enable resolution and dismissal.

But as such, we need it to be a formal representation, in writing.

We look forward to your response.

Best,  
Chris Horner

\*\*\*\*\*

The information contained in this message may be privileged. This transmission is therefore intended by the sender to be confidential and intended only for the proper recipient. If you are not the intended recipient distribution of this message is prohibited.

-----Original Message-----

From: Hans Bader <[HBader@cei.org](mailto:HBader@cei.org)>  
To: Lo, Michelle (USADC) (USADC) <[Michelle.Lo2@usdoj.gov](mailto:Michelle.Lo2@usdoj.gov)>  
Cc: Sam Kazman <[SKazman@cei.org](mailto:SKazman@cei.org)>; Chris Horner <[chornerlaw@aol.com](mailto:chornerlaw@aol.com)>  
Sent: Thu, Aug 1, 2013 11:30 am  
Subject: RE: CEI v. EPA, 13-0779 (BAH)

I should note that we have no objection to the proposed briefing schedule you suggested

(EPA's Motion for Summary Judgment	September 16, 2013
CEI's Opposition to EPA's Motion for Summary Judgment	October 16, 2013
EPA's Reply	November 6,
2013).	

But, hopefully, we can tie up the loose ends described below in my earlier email, and moot the need for any summary judgment motion (by resolving the case before then).

I will call you in a few minutes to try to get these things squared away.

Thanks,

Hans Bader  
CEI

---

**From:** Hans Bader  
**Sent:** Wednesday, July 31, 2013 8:25 PM  
**To:** 'Lo, Michelle (USADC)'  
**Cc:** Sam Kazman; Chris Horner  
**Subject:** RE: CEI v. EPA, 13-0779 (BAH)

You are correct that I am only seeking the text messages for 18 specific dates, not the text messages in

general. The reason I am asking about the text messages not being preserved in general over that period (July 9, 2009 to June 29, 2012) is just to confirm the apparent reason why the text messages don't exist for those 18 dates. Once this is understood, the query makes sense, to clarify matters and eliminate any ambiguities.

Thanks,

Hans

---

**From:** Lo, Michelle (USADC) [<mailto:Michelle.Lo2@usdoj.gov>]  
**Sent:** Wednesday, July 31, 2013 6:19 PM  
**To:** Hans Bader  
**Cc:** Sam Kazman; Chris Horner  
**Subject:** RE: CEI v. EPA, 13-0779 (BAH)

Dear Hans,

As I stated below and as reflected in the EPA's answer to the complaint, the Agency did not locate any text messages for the 18 dates specified by your FOIA request. As for your question about the preservation of Ms. McCarthy's text messages in general, we are now going well beyond the scope of this FOIA litigation, and I do not believe this is the appropriate forum to address this question.

Thanks,  
Michelle

---

**From:** Hans Bader [<mailto:HBader@cei.org>]  
**Sent:** Wednesday, July 31, 2013 4:08 PM  
**To:** Lo, Michelle (USADC)  
**Cc:** Sam Kazman; Chris Horner  
**Subject:** RE: CEI v. EPA, 13-0779 (BAH)

Thanks for the clarifying details. Does this mean that her text messages in general weren't preserved, or just that the agency didn't locate any such messages for the 18 dates specified by the FOIA request? (Just tying up loose ends.)

Thanks,

Hans

---

**From:** Lo, Michelle (USADC) [<mailto:Michelle.Lo2@usdoj.gov>]  
**Sent:** Wednesday, July 31, 2013 3:42 PM  
**To:** Hans Bader  
**Cc:** Sam Kazman; Chris Horner  
**Subject:** RE: CEI v. EPA, 13-0779 (BAH)

Dear Hans,

Thank you for the call just now. To summarize our discussion, I've inquired with the EPA about your question below, and EPA has explained that the Agency did not locate any text messages responsive to your FOIA request at issue in this case. Moreover and in any event, Ms. McCarthy uses text messaging to communicate with her family. Ms. McCarthy uses email for government business, and text messaging for family and other personal business. These personal text messages are unrelated to Agency business, and thus were not required to be preserved by the Agency.

It's my understanding that you will be filing a stipulation of dismissal in this case. I do have one edit, which is to add "with each party to bear its own costs and fees" to the end of the stipulation. I have also



made a formatting change to the signature block since my telephone number is changing. If these changes are acceptable to you, you are authorized to file the stipulation on behalf of the parties.

Thanks,  
Michelle

Michelle Lo  
Assistant United States Attorney  
Civil Division  
555 4th Street, N.W.  
Washington, D.C. 20530  
(202) 252-2541 – **Please note new number**  
(202) 514-8780 fax  
[Michelle.Lo2@usdoj.gov](mailto:Michelle.Lo2@usdoj.gov)

---

**From:** Hans Bader [<mailto:HBader@cei.org>]  
**Sent:** Monday, July 29, 2013 3:02 PM  
**To:** Lo, Michelle (USADC)  
**Cc:** Sam Kazman; Chris Horner  
**Subject:** RE: CEI v. EPA, 13-0779 (BAH)

One final thing: My colleagues are curious and want an answer to the following question before we dismiss the case: How can there be no responsive records (as stated by EPA in its no-records response, and echoed in the answer), that is, no text messages, when EPA has elsewhere produced documents to us saying that Ms. McCarthy sent hundreds of text messages using her EPA device (see the attached administrative response by EPA to Chris Horner's FOIA request – the first attached file is EPA's cover letter in response to that request, and the second is its substantive response)? I'd like to get that clarification on that issue before filing the stipulation I sent earlier.

Thanks,

Hans Bader  
CEI

---

**From:** Hans Bader  
**Sent:** Monday, July 29, 2013 12:17 PM  
**To:** 'Lo, Michelle (USADC)'  
**Cc:** Sam Kazman  
**Subject:** RE: CEI v. EPA, 13-0779 (BAH)

Oops. The draft stipulation I sent in the below email had the wrong docket number on it. That has been fixed in the attached draft stipulation.

---

**From:** Hans Bader  
**Sent:** Monday, July 29, 2013 12:11 PM  
**To:** 'Lo, Michelle (USADC)'  
**Cc:** Sam Kazman  
**Subject:** RE: CEI v. EPA, 13-0779 (BAH)

Chris Horner remains very skeptical of the no-records response. Nevertheless, it seems to me that it may not be worth the candle to keep litigating this particular case, as a prudential matter.

Accordingly, plaintiff would be willing to file the attached stipulation of dismissal. If this is acceptable to you, then it can be filed with the court, and it will not be necessary to set a briefing schedule.

Sorry for the delay in responding.

Thank you.

Hans Bader  
Competitive Enterprise Institute  
(202) 331-2278  
[hbader@cei.org](mailto:hbader@cei.org)

---

**From:** Lo, Michelle (USADC) [<mailto:Michelle.Lo2@usdoj.gov>]  
**Sent:** Monday, July 29, 2013 10:11 AM  
**To:** Hans Bader  
**Subject:** RE: CEI v. EPA, 13-0779 (BAH)

Dear Hans:

Per Judge Howell's Standing Order, the parties are to jointly prepare and submit a report indicating whether the agency has made a final determination on compliance with the FOIA request at issue and propose a schedule for the filing of dispositive motions within 14 days after any defendant appears, or by this Friday, August 2. As you know, the EPA issued a "no records" response to CEI's FOIA request on May 31, 2013. Provided CEI intends to proceed with this litigation, we propose the following briefing schedule:

EPA's Motion for Summary Judgment	September 16, 2013
CEI's Opposition to EPA's Motion for Summary Judgment	October 16, 2013
EPA's Reply	November 6, 2013

Please let me know if the above proposal is agreeable to you. Thank you.

Michelle Lo  
Assistant United States Attorney  
Civil Division  
555 4th Street, N.W.  
Washington, D.C. 20530  
(202) 252-2541 – ***Please note new number***  
(202) 514-8780 fax  
[Michelle.Lo2@usdoj.gov](mailto:Michelle.Lo2@usdoj.gov)

---

**From:** Hans Bader [<mailto:HBader@cei.org>]  
**Sent:** Wednesday, July 17, 2013 6:06 PM  
**To:** Lo, Michelle (USADC)  
**Subject:** RE: CEI v. EPA, 13-0779 (BAH)

I am still waiting to hear back. Sorry about the delay.

---

**From:** Lo, Michelle (USADC) [<mailto:Michelle.Lo2@usdoj.gov>]  
**Sent:** Wednesday, July 17, 2013 6:00 PM  
**To:** Hans Bader  
**Subject:** RE: CEI v. EPA, 13-0779 (BAH)

Hans:

Have you had a chance to discuss with your colleagues whether CEI intends to move forward with this litigation in light of the EPA's no records response?

Thanks,  
Michelle

---

**From:** Lo, Michelle (USADC)  
**Sent:** Thursday, July 11, 2013 4:12 PM  
**To:** Hans Bader <[HBader@cei.org](mailto:HBader@cei.org)> ([HBader@cei.org](mailto:HBader@cei.org))  
**Subject:** CEI v. EPA, 13-0779 (BAH)

Hans:

Attached is the EPA's response to CEI's FOIA request for "copies of all text messages sent by Assistant Administrator for Air and Radiation Gina McCarthy on a mobile telephone provided for her use by the Agency" that I was referring to on our call just now. Please let me know if CEI believes that further litigation of this case will be necessary in light of the EPA's no records response. Thank you.

<< File: Final Response 6005.pdf >>

Michelle Lo  
Assistant United States Attorney  
Civil Division  
555 4th Street, N.W.  
Washington, D.C. 20530  
(202) 514-5134; (202) 514-8780 fax  
[Michelle.Lo2@usdoj.gov](mailto:Michelle.Lo2@usdoj.gov)

**From:** [McDermott, Marna](#)  
**To:** [Minoli, Kevin](#); [Weinstock, Larry](#); [Miller, Kevin](#); [Ketcham-Colwill, Nancy](#)  
**Subject:** RE: Detailed Billing for Gina McCarthy  
**Date:** Thursday, June 27, 2013 4:03:00 PM

---

Sure. Larry - Can you give me a call re: who to include. Thanks.

Marna McDermott  
Associate Deputy General Counsel  
U.S. Environmental Protection Agency  
(202) 564-2890

-----Original Message-----

From: Minoli, Kevin  
Sent: Thursday, June 27, 2013 4:02 PM  
To: Weinstock, Larry; Miller, Kevin; Ketcham-Colwill, Nancy  
Cc: McDermott, Marna  
Subject: RE: Detailed Billing for Gina McCarthy

I'm running out the door, but think it would be good for us to have a call on Monday to discuss where we are and the production schedule. Marna, any chance you could have Gail set this up, please? Thanks, Kevin

Kevin S. Minoli  
Acting Principal Deputy General Counsel  
Office of General Counsel  
Main Office Line: 202-564-8064  
Direct Dial: 202-564-5551

-----Original Message-----

From: Weinstock, Larry  
Sent: Thursday, June 27, 2013 3:26 PM  
To: Minoli, Kevin; Miller, Kevin; Ketcham-Colwill, Nancy  
Cc: McDermott, Marna  
Subject: FW: Detailed Billing for Gina McCarthy

(b) (5) DPP [REDACTED]

Larry

-----Original Message-----

From: Reilly, Tom  
Sent: Thursday, June 27, 2013 3:13 PM  
To: Weinstock, Larry  
Subject: FW: Detailed Billing for Gina McCarthy

Larry,

(b) (5) DPP [REDACTED]

Tom

-----Original Message-----

From: DAVIS, TANIKA  
Sent: Tuesday, June 25, 2013 1:26 PM  
To: Reilly, Tom; Clark, Dee; Grantham, Jessica  
Cc: Aydlett, Dwayne; Lanier, Lynsey; Beaver, William  
Subject: RE: Detailed Billing for Gina McCarthy

Tom,

(b) (5) DPP

lease let me know if you have any questions.

Thanks,

Tanika Davis  
ECS Team - EPA ITS - ACT II Contractor  
Sr. Telecommunications Billing Analyst  
Information Management Group/Mobile Devices Business Office  
Tel: (919) 541-1823  
Fax: (919) 685-3118  
Email: davis.tanika@epa.gov

~~~~~  
\*\*\*PLEASE NOTE\*\*\* If you require Mobile Device related assistance, please use the following contacts:  
EZTech Locations - EPA Call Center 866-411-4372 (option 3) or EZTech@epa.gov All Other Locations - EPA Call  
Center at 866-411-4EPA or EPACALLCENTER@epa.gov

Act mindfully. Accept entirely. Move strongly. Think softly. Speak beautifully. Live simply. Love completely.

-----Original Message-----

From: Reilly, Tom  
Sent: Tuesday, June 11, 2013 3:34 PM  
To: DAVIS, TANIKA; Clark, Dee; Grantham, Jessica  
Cc: Aydlett, Dwayne; Lanier, Lynsey; Beaver, William  
Subject: RE: Detailed Billing for Gina McCarthy

Tanika,

Thanks for the information - (b) (5) DPP ?

Tom

-----Original Message-----

From: DAVIS, TANIKA  
Sent: Tuesday, June 11, 2013 3:26 PM  
To: Reilly, Tom; Clark, Dee; Grantham, Jessica  
Cc: Aydlett, Dwayne; Lanier, Lynsey; Beaver, William  
Subject: RE: Detailed Billing for Gina McCarthy

Hello Everyone,

(b) (5) DPP

Please let me know if you have any questions.

Thanks,

Tanika Davis  
ECS Team - EPA ITS - ACT II Contractor  
Sr. Telecommunications Billing Analyst  
Information Management Group/Mobile Devices Business Office  
Tel: (919) 541-1823  
Fax: (919) 685-3118  
Email: davis.tanika@epa.gov

~~~~~  
\*\*\*PLEASE NOTE\*\*\* If you require Mobile Device related assistance, please use the following contacts:  
EZTech Locations - EPA Call Center 866-411-4372 (option 3) or EZTech@epa.gov All Other Locations - EPA Call  
Center at 866-411-4EPA or EPACALLCENTER@epa.gov

Act mindfully. Accept entirely. Move strongly. Think softly. Speak beautifully. Live simply. Love completely.

-----Original Message-----

From: Reilly, Tom  
Sent: Tuesday, June 11, 2013 12:01 PM  
To: DAVIS, TANIKA; Clark, Dee; Grantham, Jessica  
Cc: Aydlett, Dwayne; Lanier, Lynsey; Beaver, William  
Subject: RE: Detailed Billing for Gina McCarthy

Thank you Tanika

-----Original Message-----

From: DAVIS, TANIKA  
Sent: Tuesday, June 11, 2013 11:59 AM  
To: Reilly, Tom; Clark, Dee; Grantham, Jessica  
Cc: Aydlett, Dwayne; Lanier, Lynsey; Beaver, William  
Subject: RE: Detailed Billing for Gina McCarthy

Tom,

I was in a meeting. I am working on that now. I will send as soon as possible.

Thanks,

Tanika Davis  
ECS Team - EPA ITS - ACT II Contractor  
Sr. Telecommunications Billing Analyst  
Information Management Group/Mobile Devices Business Office  
Tel: (919) 541-1823  
Fax: (919) 685-3118  
Email: davis.tanika@epa.gov

~~~~~  
\*\*\*PLEASE NOTE\*\*\* If you require Mobile Device related assistance, please use the following contacts:  
EZTech Locations - EPA Call Center 866-411-4372 (option 3) or EZTech@epa.gov All Other Locations - EPA Call  
Center at 866-411-4EPA or EPACALLCENTER@epa.gov

Act mindfully. Accept entirely. Move strongly. Think softly. Speak beautifully. Live simply. Love completely.

-----Original Message-----

From: Reilly, Tom  
Sent: Tuesday, June 11, 2013 11:28 AM

To: DAVIS, TANIKA; Clark, Dee; Grantham, Jessica  
Cc: Aydlett, Dwayne; Lanier, Lynsey; Beaver, William  
Subject: RE: Detailed Billing for Gina McCarthy

Tanika,

(b) (5) DPP

Tom

-----Original Message-----

From: DAVIS, TANIKA  
Sent: Monday, June 10, 2013 5:39 PM  
To: Reilly, Tom; Clark, Dee; Grantham, Jessica  
Cc: Aydlett, Dwayne; Lanier, Lynsey; Beaver, William  
Subject: RE: Detailed Billing for Gina McCarthy

Hello Everyone,

(b) (5) DPP

Thanks,

Tanika Davis  
ECS Team - EPA ITS - ACT II Contractor  
Sr. Telecommunications Billing Analyst  
Information Management Group/Mobile Devices Business Office  
Tel: (919) 541-1823  
Fax: (919) 685-3118  
Email: davis.tanika@epa.gov

~~~~~  
\*\*\*PLEASE NOTE\*\*\* If you require Mobile Device related assistance, please use the following contacts:  
EZTech Locations - EPA Call Center 866-411-4372 (option 3) or EZTech@epa.gov All Other Locations - EPA Call  
Center at 866-411-4EPA or EPACALLCENTER@epa.gov

Act mindfully. Accept entirely. Move strongly. Think softly. Speak beautifully. Live simply. Love completely.

-----Original Message-----

From: Reilly, Tom  
Sent: Monday, June 10, 2013 2:02 PM  
To: DAVIS, TANIKA; Clark, Dee; Grantham, Jessica  
Cc: Aydlett, Dwayne; Lanier, Lynsey; Beaver, William  
Subject: RE: Detailed Billing for Gina McCarthy

Tanika,

Give me what you can by the end of today


Tom

-----Original Message-----

From: DAVIS, TANIKA  
Sent: Monday, June 10, 2013 2:00 PM  
To: Clark, Dee; Grantham, Jessica  
Cc: Reilly, Tom; Aydlett, Dwayne; Lanier, Lynsey; Beaver, William  
Subject: RE: Detailed Billing for Gina McCarthy

Dee,

(b) (5) DPP



Please advise.

Thanks,

Tanika Davis  
ECS Team - EPA ITS - ACT II Contractor  
Sr. Telecommunications Billing Analyst  
Information Management Group/Mobile Devices Business Office  
Tel: (919) 541-1823  
Fax: (919) 685-3118  
Email: davis.tanika@epa.gov

~~~~~  
\*\*\*PLEASE NOTE\*\*\* If you require Mobile Device related assistance, please use the following contacts:  
EZTech Locations - EPA Call Center 866-411-4372 (option 3) or EZTech@epa.gov All Other Locations - EPA Call  
Center at 866-411-4EPA or EPACALLCENTER@epa.gov


Act mindfully. Accept entirely. Move strongly. Think softly. Speak beautifully. Live simply. Love completely.

-----Original Message-----

From: Clark, Dee  
Sent: Monday, June 10, 2013 12:45 PM  
To: DAVIS, TANIKA; Grantham, Jessica  
Cc: Reilly, Tom; Aydlett, Dwayne; Lanier, Lynsey; Beaver, William  
Subject: RE: Detailed Billing for Gina McCarthy  
Importance: High

Tanika,

(b) (5) DPP



Thanks,

Dee Clark  
WCF Service Manager for MD, YA, LD, LE, & LF ATPOC for TDD 04 & 09 (ITS-ACT II) ITIL v3 Foundation  
Level Certified U. S. EPA | OEI | OTOP | EDSD | EPA West - 6312L clark.dee@epa.gov | 202-566-0890 office |  
202-297-5756 cell




-----Original Message-----

From: DAVIS, TANIKA  
Sent: Monday, June 10, 2013 12:25 PM  
To: Clark, Dee; Grantham, Jessica  
Cc: Reilly, Tom; Aydlett, Dwayne; Lanier, Lynsey; Beaver, William  
Subject: RE: Detailed Billing for Gina McCarthy

Dee,

(b) (5) DPP



Thanks,

Tanika Davis  
ECS Team - EPA ITS - ACT II Contractor  
Sr. Telecommunications Billing Analyst  
Information Management Group/Mobile Devices Business Office  
Tel: (919) 541-1823  
Fax: (919) 685-3118  
Email: davis.tanika@epa.gov

~~~~~  
\*\*\*PLEASE NOTE\*\*\* If you require Mobile Device related assistance, please use the following contacts:  
EZTech Locations - EPA Call Center 866-411-4372 (option 3) or EZTech@epa.gov All Other Locations - EPA Call  
Center at 866-411-4EPA or EPACALLCENTER@epa.gov

Act mindfully. Accept entirely. Move strongly. Think softly. Speak beautifully. Live simply. Love completely.

-----Original Message-----

From: Clark, Dee  
Sent: Monday, June 10, 2013 11:29 AM  
To: Grantham, Jessica; DAVIS, TANIKA  
Cc: Reilly, Tom; Aydlett, Dwayne; Lanier, Lynsey; Beaver, William  
Subject: FW: Detailed Billing for Gina McCarthy

Jessica/Tanika,

Please provide the requested data today.

Thanks for your hard work on this!!!

Dee Clark  
WCF Service Manager for MD, YA, LD, LE, & LF ATPOC for TDD 04 & 09 (ITS-ACT II) ITIL v3 Foundation  
Level Certified U. S. EPA | OEI | OTOP | EDSD | EPA West - 6312L clark.dee@epa.gov | 202-566-0890 office |  
202-297-5756 cell

-----Original Message-----

From: Reilly, Tom  
Sent: Thursday, June 06, 2013 11:10 AM  
To: Clark, Dee  
Subject: FW: Detailed Billing for Gina McCarthy

Dee,

(b) (5) DPP

Tom

-----Original Message-----

From: Slade, Reginald

Sent: Thursday, June 06, 2013 9:41 AM

To: Reilly, Tom

Subject: RE: Detailed Billing for Gina McCarthy

Tom,

(b) (5) DPP

Many thanks,

Reginald A. Slade

Team Leader/Information Management Officer (IMO) Office of Air and Radiation

202 564-1346

-----Original Message-----

From: Slade, Reginald

Sent: Wednesday, June 05, 2013 9:35 AM

To: Reilly, Tom

Subject: RE: Detailed Billing for Gina McCarthy

Thanks Tom!

Reginald A. Slade

Team Leader/Information Management Officer (IMO) Office of Air and Radiation

202 564-1346

-----Original Message-----

From: Reilly, Tom

Sent: Wednesday, June 05, 2013 9:25 AM

To: Slade, Reginald; Noga, Vaughn; Clark, Dee; Grantham, Jessica; DAVIS, TANIKA

Cc: Simmons, Joseph; Lee, Maja; Aydlett, Dwayne; Beaver, William; Lanier, Lynsey; Salgado, Omayra

Subject: RE: Detailed Billing for Gina McCarthy

Reggie,

I have the Lockheed guys pulling that for you right now

Tom

-----Original Message-----

From: Slade, Reginald

Sent: Wednesday, June 05, 2013 9:24 AM

To: Noga, Vaughn; Clark, Dee; Grantham, Jessica; DAVIS, TANIKA

Cc: Simmons, Joseph; Lee, Maja; Reilly, Tom; Aydlett, Dwayne; Beaver, William; Lanier, Lynsey; Salgado, Omayra  
Subject: RE: Detailed Billing for Gina McCarthy

Vaughn,

(b) (5) DPP

Thanks.

Reginald A. Slade  
Team Leader/Information Management Officer (IMO) Office of Air and Radiation  
202 564-1346

-----Original Message-----

From: Noga, Vaughn  
Sent: Wednesday, June 05, 2013 9:22 AM  
To: Slade, Reginald; Clark, Dee; Grantham, Jessica; DAVIS, TANIKA  
Cc: Simmons, Joseph; Lee, Maja; Reilly, Tom; Aydlett, Dwayne; Beaver, William; Lanier, Lynsey; Salgado, Omayra  
Subject: RE: Detailed Billing for Gina McCarthy

Reggie,

(b) (5) DPP

?

Vaughn

-----Original Message-----

From: Slade, Reginald  
Sent: Wednesday, June 05, 2013 9:19 AM  
To: Noga, Vaughn; Clark, Dee; Grantham, Jessica; DAVIS, TANIKA  
Cc: Simmons, Joseph; Lee, Maja; Reilly, Tom; Aydlett, Dwayne; Beaver, William; Lanier, Lynsey; Salgado, Omayra  
Subject: RE: Detailed Billing for Gina McCarthy

Vaughn,

(b) (5) DPP

Many thanks,

Reginald A. Slade  
Team Leader/Information Management Officer (IMO) Office of Air and Radiation  
202 564-1346

-----Original Message-----

From: Noga, Vaughn  
Sent: Tuesday, June 04, 2013 3:50 PM  
To: Slade, Reginald; Clark, Dee; Grantham, Jessica; DAVIS, TANIKA  
Cc: Simmons, Joseph; Lee, Maja; Reilly, Tom; Aydlett, Dwayne; Beaver, William; Lanier, Lynsey

Subject: Re: Detailed Billing for Gina McCarthy

Thank you.

Team - please provide an ETA for the info.

---

From: Slade, Reginald  
Sent: Tuesday, June 04, 2013 12:59:28 PM  
To: Noga, Vaughn; Clark, Dee; Grantham, Jessica; DAVIS, TANIKA  
Cc: Simmons, Joseph; Lee, Maja; Reilly, Tom; Aydlett, Dwayne; Beaver, William; Lanier, Lynsey  
Subject: RE: Detailed Billing for Gina McCarthy

Officially less than 20 working days. Since the request is for Gina, her Chief of Staff is anticipating that to mean this week, if possible.

Thanks,

Reginald A. Slade  
Team Leader/Information Management Officer (IMO) Office of Air and Radiation  
202 564-1346

-----Original Message-----

From: Noga, Vaughn  
Sent: Tuesday, June 04, 2013 12:54 PM  
To: Clark, Dee; Grantham, Jessica; DAVIS, TANIKA  
Cc: Slade, Reginald; Simmons, Joseph; Lee, Maja; Reilly, Tom; Aydlett, Dwayne; Beaver, William; Lanier, Lynsey  
Subject: RE: Detailed Billing for Gina McCarthy

Is there a suspense date associated with this request?

-----Original Message-----

From: Clark, Dee  
Sent: Tuesday, June 04, 2013 11:38 AM  
To: Grantham, Jessica; DAVIS, TANIKA  
Cc: Slade, Reginald; Simmons, Joseph; Noga, Vaughn; Lee, Maja; Reilly, Tom; Aydlett, Dwayne; Beaver, William; Lanier, Lynsey  
Subject: FW: Detailed Billing for Gina McCarthy  
Importance: High

Jessica/Tanika,

Please provide the Call Detail Records (CDRs) requested by OAR for Gina McCarthy.

Thanks,

Dee Clark  
WCF Service Manager for MD, YA, LD, LE, & LF ATPOC for TDD 04 & 09 (ITS-ACT II) ITIL v3 Foundation  
Level Certified U.S. EPA | OEI |OTOP | EDSD | EPA West - 6312L | clark.dee@epa.gov | 202-566-0890 office  
|202-297-5756 cell

---

From: Simmons, Joseph  
Sent: Tuesday, June 04, 2013 9:57 AM  
To: EPA Call Center with questions

Cc: Clark, Dee; Slade, Reginald  
Subject: Detailed Billing for Gina McCarthy

This message is to request detailed billing for Gina McCarthy's mobile devices for the dates of July 1, 2009 to June 30, 2012. The devices are:

1. AT&T Torch - phone number (b) (6)
2. Verizon Cell Phone - phone number (b) (6)

This request is in response to a FOIA request from Congress. Feel free to contact me if you have any questions or concerns.

Thanks

Joseph  
OAR/OPMO  
202-564-1296

**From:** [Wachter, Eric](#)  
**To:** [Newton, Jonathan](#); [Ketcham-Colwill, Nancy](#)  
**Cc:** [Weinstock, Larry](#); [Minoli, Kevin](#); [Gottesman, Larry](#); [McDermott, Marna](#); [Hamilton, Sabrina](#)  
**Subject:** RE: EPA-HQ-2013-008908 Christopher Horner fee waiver determination  
**Date:** Wednesday, August 14, 2013 9:57:02 AM

---

(b) (5) DPP, (b) (5) ACP

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

---

**From:** Newton, Jonathan  
**Sent:** Tuesday, August 13, 2013 6:42 PM  
**To:** Ketcham-Colwill, Nancy; Wachter, Eric  
**Cc:** Weinstock, Larry; Minoli, Kevin; Gottesman, Larry; McDermott, Marna; Hamilton, Sabrina  
**Subject:** RE: EPA-HQ-2013-008908 Christopher Horner fee waiver determination

Hi Nancy,

(b) (5) DPP, (b) (5) ACP

[REDACTED]

[REDACTED]

[REDACTED]

Thanks,  
Jonathan

Jonathan V. Newton, Attorney-Advisor  
U.S. EPA, Office of the Executive Secretariat  
1200 Pennsylvania Avenue, NW (MC 1105A)  
Washington, D.C. 20460  
(202) 566-1981

---

**From:** Ketcham-Colwill, Nancy  
**Sent:** Tuesday, August 13, 2013 5:49 PM  
**To:** McDermott, Marna; Hamilton, Sabrina; Newton, Jonathan  
**Cc:** Weinstock, Larry; Minoli, Kevin; Gottesman, Larry  
**Subject:** RE: EPA-HQ-2013-008908 Christopher Horner fee waiver determination

(b) (5) DPP, (b) (5) ACP

[REDACTED]

[REDACTED]

[REDACTED]. Thanks.

**From:** McDermott, Marna  
**Sent:** Tuesday, August 13, 2013 5:02 PM  
**To:** Hamilton, Sabrina; Newton, Jonathan  
**Cc:** Ketcham-Colwill, Nancy; Weinstock, Larry; Minoli, Kevin; Gottesman, Larry  
**Subject:** RE: EPA-HQ-2013-008908 Christopher Horner fee waiver determination

(b) (5) DPP, (b) (5) ACP



A large rectangular area of the email body is completely redacted with black bars.

Thanks,  
Marna

Marna McDermott  
Associate Deputy General Counsel  
U.S. Environmental Protection Agency  
(202) 564-2890

---

**From:** Hamilton, Sabrina  
**Sent:** Tuesday, August 13, 2013 3:57 PM  
**To:** Newton, Jonathan  
**Cc:** Ketcham-Colwill, Nancy; McDermott, Marna; Weinstock, Larry  
**Subject:** FW: EPA-HQ-2013-008908 Christopher Horner fee waiver determination

Jonathan,

Please see message from Larry Weinstock below.

Sabrina

---

**From:** Newton, Jonathan  
**Sent:** Tuesday, August 13, 2013 1:51 PM  
**To:** Weinstock, Larry  
**Cc:** Hamilton, Sabrina  
**Subject:** EPA-HQ-2013-008908 Assigned to AO?

Hey Larry,

(b) (5) DPP

Thanks,  
Jonathan

Jonathan V. Newton, Attorney-Advisor  
U.S. EPA, Office of the Executive Secretariat  
1200 Pennsylvania Avenue, NW (MC 1105A)  
Washington, D.C. 20460  
(202) 566-1981

---

**From:** Weinstock, Larry  
**Sent:** Friday, August 09, 2013 8:45 AM  
**To:** Hamilton, Sabrina  
**Cc:** Ketcham-Colwill, Nancy  
**Subject:** RE: EPA-HQ-2013-008908 Christopher Horner fee waiver determination

(b) (5) DPP

---

**From:** Hamilton, Sabrina  
**Sent:** Friday, August 09, 2013 7:58 AM  
**To:** Weinstock, Larry  
**Cc:** Ketcham-Colwill, Nancy  
**Subject:** FW: EPA-HQ-2013-008908 Christopher Horner fee waiver determination

Larry,

(b) (5) DPP

Please advise.

Sabrina

---

**From:** Hamilton, Sabrina  
**Sent:** Thursday, August 08, 2013 11:42 AM  
**To:** Newton, Jonathan; Boyd, Rory  
**Cc:** Warden, Vivian  
**Subject:** FW: EPA-HQ-2013-008908 Christopher Horner fee waiver determination

Jonathan/Rory,

(b) (5) DPP

Thanks

Sabrina



---

**From:** Weinstock, Larry  
**Sent:** Thursday, August 08, 2013 11:17 AM  
**To:** Hamilton, Sabrina  
**Cc:** Ketcham-Colwill, Nancy  
**Subject:** RE: EPA-HQ-2013-008908 Christopher Horner fee waiver determination

(b) (5) DPP

Larry

---

**From:** Hamilton, Sabrina  
**Sent:** Thursday, August 08, 2013 10:52 AM  
**To:** Weinstock, Larry  
**Cc:** Ketcham-Colwill, Nancy  
**Subject:** FW: EPA-HQ-2013-008908 Christopher Horner fee waiver determination

Larry,

Please check FOIAonline for the attached assignment. Please "Perfect" the case if you are the person that will be responsible for this assignment. Please note that the request is not being billed for charges.

Sabrina

---

**From:** Warden, Vivian  
**Sent:** Thursday, August 08, 2013 10:43 AM  
**To:** Hamilton, Sabrina; Hammond, Gloria  
**Subject:** EPA-HQ-2013-008908 Christopher Horner fee waiver determination

This is to let you know that request EPA-HQ-2013-008908 has been assigned to OAR, and that today the requester was sent a "not billable" fee waiver determination. If you have any questions regarding this, please call Larry Gottesman. Thank you.

Vivian Warden  
FOIA Specialist  
202-566-1663

FOIA and Privacy Branch  
202-566-1667 (main FOIA office line)

**From:** [McDermott, Marna](#)  
**To:** [Weinstock, Larry](#)  
**Cc:** [Ketcham-Colwill, Nancy](#); [Miller, Kevin](#); [Minoli, Kevin](#); [Newton, Jonathan](#); [Nguyen, Quoc](#)  
**Subject:** RE: EPA-HQ-2013-008908 Christopher Horner fee waiver determination  
**Date:** Tuesday, September 03, 2013 12:12:00 PM

---

(b) (5) DPP, (b) (5) ACP

[REDACTED]

[REDACTED]

[REDACTED]

Thanks.

Marna McDermott  
Associate Deputy General Counsel  
U.S. Environmental Protection Agency  
(202) 564-2890

---

**From:** Weinstock, Larry  
**Sent:** Wednesday, August 28, 2013 8:48 AM  
**To:** McDermott, Marna; Miller, Kevin; Minoli, Kevin; Newton, Jonathan  
**Cc:** Ketcham-Colwill, Nancy  
**Subject:** RE: EPA-HQ-2013-008908 Christopher Horner fee waiver determination

Heres the attachment.

Larry

---

**From:** Weinstock, Larry  
**Sent:** Tuesday, August 27, 2013 4:32 PM  
**To:** McDermott, Marna; Miller, Kevin; Minoli, Kevin; Newton, Jonathan  
**Cc:** Ketcham-Colwill, Nancy  
**Subject:** Re: EPA-HQ-2013-008908 Christopher Horner fee waiver determination

Sorry forgot attachment will resend tomorrow morning.

Larry

---

**From:** Weinstock, Larry  
**Sent:** Tuesday, August 27, 2013 3:54:55 PM  
**To:** McDermott, Marna; Miller, Kevin; Minoli, Kevin; Newton, Jonathan  
**Cc:** Ketcham-Colwill, Nancy  
**Subject:** RE: EPA-HQ-2013-008908 Christopher Horner fee waiver determination

(b) (5) DPP, (b) (5) ACP

[REDACTED]

[REDACTED]

(b) (5) DPP, (b) (5) ACP

Thanks,  
Larry

---

**From:** McDermott, Marna  
**Sent:** Friday, August 23, 2013 12:43 PM  
**To:** Weinstock, Larry; Miller, Kevin  
**Cc:** Ketcham-Colwill, Nancy  
**Subject:** RE: EPA-HQ-2013-008908 Christopher Horner fee waiver determination

(b) (5) DPP, (b) (5) ACP

. Thank you.

Marna McDermott  
Associate Deputy General Counsel  
U.S. Environmental Protection Agency  
(202) 564-2890

---

**From:** Weinstock, Larry  
**Sent:** Friday, August 23, 2013 11:39 AM  
**To:** Miller, Kevin; McDermott, Marna  
**Cc:** Ketcham-Colwill, Nancy  
**Subject:** FW: EPA-HQ-2013-008908 Christopher Horner fee waiver determination

(b) (5) DPP, (b) (5) ACP

?

Larry

---

**From:** Ketcham-Colwill, Nancy  
**Sent:** Friday, August 23, 2013 11:18 AM  
**To:** Weinstock, Larry  
**Subject:** FW: EPA-HQ-2013-008908 Christopher Horner fee waiver determination

---

**From:** Ketcham-Colwill, Nancy  
**Sent:** Tuesday, August 13, 2013 7:05 PM  
**To:** Miller, Kevin; McDermott, Marna  
**Subject:** FW: EPA-HQ-2013-008908 Christopher Horner fee waiver determination

(b) (5) DPP, (b) (5) ACP

Please advise. Thanks!

---

**From:** Newton, Jonathan

**Sent:** Tuesday, August 13, 2013 6:42 PM  
**To:** Ketcham-Colwill, Nancy; Wachter, Eric  
**Cc:** Weinstock, Larry; Minoli, Kevin; Gottesman, Larry; McDermott, Marna; Hamilton, Sabrina  
**Subject:** RE: EPA-HQ-2013-008908 Christopher Horner fee waiver determination

Hi Nancy,

(b) (5) DPP, (b) (5) ACP

Thanks,  
Jonathan

Jonathan V. Newton, Attorney-Advisor  
U.S. EPA, Office of the Executive Secretariat  
1200 Pennsylvania Avenue, NW (MC 1105A)  
Washington, D.C. 20460  
(202) 566-1981

---

**From:** Ketcham-Colwill, Nancy  
**Sent:** Tuesday, August 13, 2013 5:49 PM  
**To:** McDermott, Marna; Hamilton, Sabrina; Newton, Jonathan  
**Cc:** Weinstock, Larry; Minoli, Kevin; Gottesman, Larry  
**Subject:** RE: EPA-HQ-2013-008908 Christopher Horner fee waiver determination

(b) (5) DPP, (b) (5) ACP

. Thanks.

---

**From:** McDermott, Marna  
**Sent:** Tuesday, August 13, 2013 5:02 PM  
**To:** Hamilton, Sabrina; Newton, Jonathan  
**Cc:** Ketcham-Colwill, Nancy; Weinstock, Larry; Minoli, Kevin; Gottesman, Larry  
**Subject:** RE: EPA-HQ-2013-008908 Christopher Horner fee waiver determination

(b) (5) DPP, (b) (5) ACP

(b) (5) DPP, (b) (5) ACP

Thanks,  
Marna

Marna McDermott  
Associate Deputy General Counsel  
U.S. Environmental Protection Agency  
(202) 564-2890

---

**From:** Hamilton, Sabrina  
**Sent:** Tuesday, August 13, 2013 3:57 PM  
**To:** Newton, Jonathan  
**Cc:** Ketcham-Colwill, Nancy; McDermott, Marna; Weinstock, Larry  
**Subject:** FW: EPA-HQ-2013-008908 Christopher Horner fee waiver determination

Jonathan,

Please see message from Larry Weinstock below.

Sabrina

---

**From:** Newton, Jonathan  
**Sent:** Tuesday, August 13, 2013 1:51 PM  
**To:** Weinstock, Larry  
**Cc:** Hamilton, Sabrina  
**Subject:** EPA-HQ-2013-008908 Assigned to AO?

Hey Larry,

(b) (5) DPP

Thanks,  
Jonathan

Jonathan V. Newton, Atttorney-Advisor  
U.S. EPA, Office of the Executive Secretariat  
1200 Pennsylvania Avenue, NW (MC 1105A)  
Washington, D.C. 20460  
(202) 566-1981

---

**From:** Weinstock, Larry  
**Sent:** Friday, August 09, 2013 8:45 AM  
**To:** Hamilton, Sabrina  
**Cc:** Ketcham-Colwill, Nancy  
**Subject:** RE: EPA-HQ-2013-008908 Christopher Horner fee waiver determination

(b) (5) DPP

---

**From:** Hamilton, Sabrina  
**Sent:** Friday, August 09, 2013 7:58 AM  
**To:** Weinstock, Larry  
**Cc:** Ketcham-Colwill, Nancy  
**Subject:** FW: EPA-HQ-2013-008908 Christopher Horner fee waiver determination

Larry,

(b) (5) DPP

Please advise.

Sabrina

---

**From:** Hamilton, Sabrina  
**Sent:** Thursday, August 08, 2013 11:42 AM  
**To:** Newton, Jonathan; Boyd, Rory  
**Cc:** Warden, Vivian  
**Subject:** FW: EPA-HQ-2013-008908 Christopher Horner fee waiver determination

Jonathan/Rory,

(b) (5) DPP

Thanks

Sabrina

---

**From:** Weinstock, Larry  
**Sent:** Thursday, August 08, 2013 11:17 AM  
**To:** Hamilton, Sabrina  
**Cc:** Ketcham-Colwill, Nancy  
**Subject:** RE: EPA-HQ-2013-008908 Christopher Horner fee waiver determination

(b) (5) DPP

Larry

---

**From:** Hamilton, Sabrina  
**Sent:** Thursday, August 08, 2013 10:52 AM  
**To:** Weinstock, Larry  
**Cc:** Ketcham-Colwill, Nancy  
**Subject:** FW: EPA-HQ-2013-008908 Christopher Horner fee waiver determination

Larry,

Please check FOIAonline for the attached assignment. Please "Perfect" the case if you are the person that will be responsible for this assignment. Please note that the request is not being billed for charges.

Sabrina

---

**From:** Warden, Vivian  
**Sent:** Thursday, August 08, 2013 10:43 AM  
**To:** Hamilton, Sabrina; Hammond, Gloria  
**Subject:** EPA-HQ-2013-008908 Christopher Horner fee waiver determination

This is to let you know that request EPA-HQ-2013-008908 has been assigned to OAR, and that today the requester was sent a "not billable" fee waiver determination. If you have any questions regarding this, please call Larry Gottesman. Thank you.

Vivian Warden  
FOIA Specialist  
202-566-1663

FOIA and Privacy Branch  
202-566-1667 (main FOIA office line)

9/16	EPA Dispositive Motion due in <i>CEI v. EPA</i> (D.D.C.) (FOIA for Gina McCarthy text messages) (GLO)
9/17	EPA Answer or motion to dismiss due in <i>Pruitt et al v. EPA</i> (state's attorneys sue-and-settle FOIA) (W.D. Okla.) (GLO)
9/18	EPA Answer due in <i>PacifiCorp v. EPA</i> (D. Col. 13-2187) (GLO)
9/19	Joint scheduling proposal due in <i>CEI v. EPA</i> (D.D.C.) (FOIA for bills for Gina McCarthy's texts) (GLO)
9/23	EPA Reply to Opposition due for <i>CEI v. EPA</i> (D.D.C.) (FOIA for Admin Emails) (GLO)
9/30	Confidential settlement statement due in <i>PPL Montana LLC v. EPA</i> (GLO)
10/8	Settlement conference due in <i>AFB et al. v. EPA</i> (D. Minn.) (GLO)
10/11	EPA replies due in <i>Hall &amp; Assoc. v. EPA</i> (2 separate FOIA cases regarding HQ & R1 docs, both in D.D.C.) (GLO)
10/15	Status Report due for <i>ATI v. EPA</i> (13-112, Sierra Club and ALA) (D.D.C.) (GLO)



**From:** [McDermott, Marna](#)  
**To:** [Kelly, Lynn](#)  
**Subject:** Re: CEI v. EPA, 13-0779 (BAH)  
**Date:** Tuesday, September 10, 2013 1:46:43 PM

---

At least one bit of positive news for the day!

---

**From:** Kelly, Lynn  
**Sent:** Tuesday, September 10, 2013 1:44:34 PM  
**To:** Minoli, Kevin  
**Cc:** McDermott, Marna; Miller, Kevin  
**Subject:** FW: CEI v. EPA, 13-0779 (BAH)

**(b) (5) DPP, (b) (5) ACP, (b) (5) AWP**

[REDACTED]

Lynn Kelly | US EPA | Office of General Counsel | 1200 Pennsylvania Ave., NW | WJC North, Mail Code 2377A | Washington DC 20460 | phone: (202) 564-3266

The contents of this e-mail and any attachments to it may contain deliberative-process, attorney-client, attorney work product, or otherwise privileged material. If you are not the intended recipient, or believe you have received this communication in error, please delete the copy you received, and do not print, copy, retransmit, disseminate, or otherwise use the information. Thank you.

---

**From:** Lo, Michelle (USADC) [mailto:Michelle.Lo2@usdoj.gov]  
**Sent:** Tuesday, September 10, 2013 1:40 PM  
**To:** Kelly, Lynn  
**Subject:** FW: CEI v. EPA, 13-0779 (BAH)

Please see below. I will let you know once the stipulation of dismissal has been filed. Thanks.

---

**From:** Lo, Michelle (USADC)  
**Sent:** Tuesday, September 10, 2013 12:22 PM  
**To:** 'Hans Bader'; Chris Horner  
**Cc:** Sam Kazman  
**Subject:** RE: CEI v. EPA, 13-0779 (BAH)

Thank you. We had exchanged a draft stipulation of dismissal at the time our discussions began, so I'm attaching it here with a revision to my new phone number. I'll look out for the filing of the stipulation in a day or two.

Michelle Lo  
Assistant United States Attorney  
Civil Division  
555 4th Street, N.W.  
Washington, D.C. 20530  
(202) 252-2541 – **Please note new number**  
(202) 514-8780 fax  
[Michelle.Lo2@usdoj.gov](mailto:Michelle.Lo2@usdoj.gov)

---

**From:** Hans Bader [<mailto:HBader@cei.org>]

**Sent:** Tuesday, September 10, 2013 12:17 PM  
**To:** Lo, Michelle (USADC); Chris Horner  
**Cc:** Sam Kazman  
**Subject:** RE: CEI v. EPA, 13-0779 (BAH)

OK. We will dismiss (I am busy writing a brief in another case, but will be done with that in a day or two, and can execute a dismissal notice then).

---

**From:** Lo, Michelle (USADC) [<mailto:Michelle.Lo2@usdoj.gov>]  
**Sent:** Tuesday, September 10, 2013 12:14 PM  
**To:** Chris Horner  
**Cc:** Hans Bader; Sam Kazman  
**Subject:** RE: CEI v. EPA, 13-0779 (BAH)

If you could please let me know by this afternoon whether you will be dismissing this case, I would appreciate it. Under the current schedule, our opening brief is due on Monday, September 16, so we will need to plan accordingly since Judge Howell requires any extension motions to be filed at least four days prior to the deadline.

---

**From:** Chris Horner [<mailto:chornerlaw@aol.com>]  
**Sent:** Monday, September 09, 2013 4:43 PM  
**To:** Lo, Michelle (USADC)  
**Cc:** [HBader@cei.org](mailto:HBader@cei.org); [SKazman@cei.org](mailto:SKazman@cei.org)  
**Subject:** Re: CEI v. EPA, 13-0779 (BAH)

Ok. Thank you.

Sent from my iPhone

On Sep 9, 2013, at 4:37 PM, "Lo, Michelle (USADC)" <[Michelle.Lo2@usdoj.gov](mailto:Michelle.Lo2@usdoj.gov)> wrote:

I had hoped to avoid this very problem, which is why I thought it would be productive for us to discuss over the phone. I don't think there is any ambiguity in my emails, but, yes, I can confirm again that I am saying the approximately three-year period from July 9, 2009 to June 29, 2012.

Thanks,  
Michelle

**From:** Chris Horner [<mailto:chornerlaw@aol.com>]  
**Sent:** Monday, September 09, 2013 4:21 PM  
**To:** Lo, Michelle (USADC); [HBader@cei.org](mailto:HBader@cei.org)  
**Cc:** [SKazman@cei.org](mailto:SKazman@cei.org)  
**Subject:** Re: CEI v. EPA, 13-0779 (BAH)

I'm sorry but I keep reading two meanings in most of these messages. Please confirm you are saying the approximately three-year period from July 9, 2009 to June 29, 2012?

Best,  
Chris Horner

\*\*\*\*\*

The information contained in this message may be privileged. This transmission is therefore intended by the sender to be confidential and intended only for the proper recipient. If you are not the intended recipient distribution of this message is prohibited.

-----Original Message-----

From: Lo, Michelle (USADC) (USADC) <[Michelle.Lo2@usdoj.gov](mailto:Michelle.Lo2@usdoj.gov)>  
To: Hans Bader <[HBader@cei.org](mailto:HBader@cei.org)>; Chris Horner <[chornerlaw@aol.com](mailto:chornerlaw@aol.com)>  
Cc: Sam Kazman <[SKazman@cei.org](mailto:SKazman@cei.org)>  
Sent: Mon, Sep 9, 2013 4:17 pm  
Subject: RE: CEI v. EPA, 13-0779 (BAH)

Yes, I mean all the dates between the period from July 9, 2009, to June 29, 2012.

---

**From:** Hans Bader [<mailto:HBader@cei.org>]  
**Sent:** Monday, September 09, 2013 3:51 PM  
**To:** Lo, Michelle (USADC); Chris Horner  
**Cc:** Sam Kazman  
**Subject:** RE: CEI v. EPA, 13-0779 (BAH)

Thanks. By "encompassing," you mean not just the 18 dates, but also the interstitial dates between them, right? (When we spoke over the phone, I did not think in detail over what was meant by the words "entire period" when you said at that time, "none of her texts over the entire period . . .", although this is still helpful). Thanks.

---

**From:** Lo, Michelle (USADC) [<mailto:Michelle.Lo2@usdoj.gov>]  
**Sent:** Monday, September 9, 2013 3:46 PM  
**To:** Chris Horner; Hans Bader  
**Cc:** Sam Kazman  
**Subject:** RE: CEI v. EPA, 13-0779 (BAH)

Chris,

I was not able to reach you just now, but I did speak with Hans and had a beneficial discussion with him. Although the requested clarification in your August 1 email goes beyond the scope of CEI's FOIA request, which seeks only text messages sent by Ms. McCarthy on the 18 specific dates, the EPA is willing to respond in the interest of reaching an amicable resolution. The agency's position is as follows:

To the very best of her recollection, Ms. McCarthy used the texting function on her EPA phone for personal purposes only and not to conduct Agency business. None of her texts over the period encompassing the 18 specific dates at issue in CEI's FOIA request (July 9, 2009, to June 29, 2012) were preserved.

We believe this should clarify any remaining ambiguity and obviate the need for further litigation. I am of course available to discuss further if you think that would be helpful. I would appreciate it if you can let me know by tomorrow if this resolves all outstanding issues.

Thanks,  
Michelle

---

**From:** Lo, Michelle (USADC)  
**Sent:** Monday, September 09, 2013 11:28 AM

**To:** 'Chris Horner'; [HBader@cei.org](mailto:HBader@cei.org)  
**Cc:** [SKazman@cei.org](mailto:SKazman@cei.org)  
**Subject:** RE: CEI v. EPA, 13-0779 (BAH)

Yes, I think there is progress on this issue, and it would be helpful for us to have a brief discussion. Please let me know when you are available. Thanks.

**From:** Chris Horner [<mailto:chornierlaw@aol.com>]  
**Sent:** Monday, September 09, 2013 11:24 AM  
**To:** Lo, Michelle (USADC); [HBader@cei.org](mailto:HBader@cei.org)  
**Cc:** [SKazman@cei.org](mailto:SKazman@cei.org)  
**Subject:** Re: CEI v. EPA, 13-0779 (BAH)

The below is where I think things were when we left off. FYI

From my 8/01 email:

we have only sought one clear statement, I \*think\* you may just clarified the ambiguity as explained below. But if you plainly state what is implied we can dismiss.

Below you more strongly imply what seemed the implication before, but is still not stated outright with no room for misunderstanding. That is that Ms. McCarthy \*only\* used the texting function on her EPA phone for personal messages; and because she never used it for work this is why EPA has preserved none of her texts.

If that is what you were saying, would you please confirm that and that this is also EPA's position. In that case, you need not take any further questions to EPA and I accept the 'no records' response as sufficient such that we will dismiss.

Is there any progress on this?

Best,  
Chris Horner

-----Original Message-----

**From:** Lo, Michelle (USADC) (USADC) <[Michelle.Lo2@usdoj.gov](mailto:Michelle.Lo2@usdoj.gov)>  
**To:** Hans Bader <[HBader@cei.org](mailto:HBader@cei.org)>; Chris Horner <[chornierlaw@aol.com](mailto:chornierlaw@aol.com)>  
**Cc:** Sam Kazman <[SKazman@cei.org](mailto:SKazman@cei.org)>  
**Sent:** Fri, Aug 16, 2013 1:51 pm  
**Subject:** RE: CEI v. EPA, 13-0779 (BAH)

My apologies for the delay, I am still waiting to hear from EPA. I think there are availability issues due to this being August, but I will get back to you as soon as I can.

---

**From:** Hans Bader [<mailto:HBader@cei.org>]  
**Sent:** Friday, August 16, 2013 1:48 PM  
**To:** Lo, Michelle (USADC); Chris Horner  
**Cc:** Sam Kazman  
**Subject:** RE: CEI v. EPA, 13-0779 (BAH)

Thanks. Hopefully, you will hear soon from EPA (your email below suggested you would hear from EPA by the week of August 5, which has now come and gone).

---

**From:** Lo, Michelle (USADC) [<mailto:Michelle.Lo2@usdoj.gov>]  
**Sent:** Friday, August 02, 2013 4:09 PM

**To:** Chris Horner; Hans Bader  
**Cc:** Sam Kazman  
**Subject:** RE: CEI v. EPA, 13-0779 (BAH)

Thanks, Chris. It is looking like I will not be able to get a response from the Agency today (due to availability issues), so I think it makes most sense for us to go ahead and file a status report with the proposed briefing schedule so we are in compliance with the Court's standing order. I should hear from EPA by early next week, so we can continue our discussions at that time. If the attached draft report is acceptable, let me know and I can take care of the filing.

**From:** [chornerlaw@aol.com](mailto:chornerlaw@aol.com) [<mailto:chornerlaw@aol.com>]  
**Sent:** Friday, August 02, 2013 2:54 PM  
**To:** Lo, Michelle (USADC); [hbader@cei.org](mailto:hbader@cei.org)  
**Cc:** [skazman@cei.org](mailto:skazman@cei.org)  
**Subject:** RE: CEI v. EPA, 13-0779 (BAH)

Yes I will, am in a mtg 3-5-something but will be able to email I think, cch  
Sent from my Verizon Wireless 4G LTE smartphone

"Lo, Michelle (USADC)" wrote:  
Dear Chris,

I am waiting to hear back from the EPA regarding your follow-up inquiry below. I am hopeful that I will have a response to you today, but it may not be until around 5 pm due to various individuals' availability. Will you be available then so we can figure out whether we will be filing a dismissal or a proposed briefing schedule at that time?

Thanks,  
Michelle

**From:** [chornerlaw@aol.com](mailto:chornerlaw@aol.com) [<mailto:chornerlaw@aol.com>]  
**Sent:** Thursday, August 01, 2013 10:05 PM  
**To:** Lo, Michelle (USADC); [hbader@cei.org](mailto:hbader@cei.org)  
**Cc:** [skazman@cei.org](mailto:skazman@cei.org)  
**Subject:** RE: CEI v. EPA, 13-0779 (BAH)

Dear Michelle,  
Rather than endless rounds of clarification, though we have only sought one clear statement, I \*think\* you may just clarified the ambiguity as explained below. But if you plainly state what is implied we can dismiss.  
Below you more strongly imply what seemed the implication before, but is still not stated outright with no room for misunderstanding. That is that Ms. McCarthy \*only\* used the texting function on her EPA phone for personal messages; and because she never used it for work this is why EPA has preserved none of her texts.  
If that is what you were saying, would you please confirm that and that this is also EPA's position. In that case, you need not take any further questions to EPA and I accept the 'no records' response as sufficient such that we will dismiss.  
I look forward to your reply.  
Best,  
Chris  
Sent from my Verizon Wireless 4G LTE smartphone

"Lo, Michelle (USADC)" wrote:  
Chris,

I will take your request back to the agency, but I would like to be clear in what I will be communicating to the agency. The Agency has already explained that Ms. McCarthy uses text messaging for family and other personal business, not government business and that, because personal text messages are unrelated to Agency business, they were not required to be preserved by the Agency. I am not sure how you read this statement to mean that Ms. McCarthy uses the texting function for EPA business. As I explained to Hans, this FOIA request deals with text messages on 18 specific dates, and we have already provided a very clear explanation for the "no records" response.

If what you are asking is – did Ms. McCarthy send ever any text messages that were work-related – I can ask the EPA if it would be willing to respond to this question even though it is well outside the scope of the FOIA request and does not alter the fact that the EPA did not locate any text messages on the 18 specific dates. If the EPA is willing to respond to the question of whether Ms. McCarthy ever sent any text messages that were work-related, can you represent that you will dismiss this case? As much as I think briefing would be an unnecessary use of the Court's and the parties' resources, it may be that we end up having to brief this matter rather than engage in endless rounds of clarification.

Best,  
Michelle

**From:** Chris Horner [<mailto:chornierlaw@aol.com>]  
**Sent:** Thursday, August 01, 2013 6:41 PM  
**To:** [HBader@cei.org](mailto:HBader@cei.org); Lo, Michelle (USADC)  
**Cc:** [SKazman@cei.org](mailto:SKazman@cei.org)  
**Subject:** Re: CEI v. EPA, 13-0779 (BAH)

Dera Michelle,

Please consider the following, in addition to what Hans has written you.

EPA's obligation is to *demonstrate* 'no records'. So far they have stated it. Demonstration is found in the bills for her device.

We have obtained what EPA claims to be the relevant (texting) portions of those bills, showing extensive texting activity, so extensive that it is thoroughly implausible that Ms. McCarthy didn't text on those dates.

After we calculated the probability (1 in 7.9 sextillion), we received your statement on EPA's behalf including the portion that is the basis for the ambiguity that Hans refers to and under which we cannot dismiss, but possibly can if you clarify what it is saying:

Ms. McCarthy uses text messaging to communicate with her family. Ms. McCarthy uses email for government business, and text messaging for family and other personal business. These personal text messages are unrelated to Agency business, and thus were not required to be preserved by the Agency.

**From:** [Kelly, Lynn](#)  
**To:** [Minoli, Kevin](#)  
**Cc:** [Miller, Kevin](#)  
**Subject:** DRAFT Fee Waiver Decision of OAR Text Messages from 11 employees request  
**Date:** Friday, February 28, 2014 10:29:37 AM  
**Attachments:** [022814 DRAFT.docx](#)  
[EPA-HQ-2014-002006 \(11\) CEI Appeal FW Denial EPA HQ 14-002006 \(1\).pdf](#)

---

Kevin,

(b) (5) DPP

. If you'd like more background on information about the request please let me know.

(b) (5) DPP

I've also attached the incoming appeal for reference.

Thank you!

Lynn Kelly | US EPA | Office of General Counsel | 1200 Pennsylvania Ave., NW | WJC North, Mail Code 2377A | Washington DC 20460 | phone: (202) 564-3266

The contents of this e-mail and any attachments to it may contain deliberative-process, attorney-client, attorney work product, or otherwise privileged material. If you are not the intended recipient, or believe you have received this communication in error, please delete the copy you received, and do not print, copy, retransmit, disseminate, or otherwise use the information. Thank you.



## **APPEAL UNDER THE FREEDOM OF INFORMATION ACT**

January 13, 2014

U.S. Environmental Protection Agency  
Records, FOIA and Privacy Branch  
1200 Pennsylvania Avenue, NW (2822T)  
Washington, D.C. 20460  
Email: [hq.foia@epa.gov](mailto:hq.foia@epa.gov)

### **Re: Appeal of Initial Determination, Fee Waiver Denial in EPA-HQ-2014-002006**

On behalf of the Competitive Enterprise Institute (CEI), we appeal EPA's denial of our request to have our fees waived or substantially reduced for the above-captioned request under the Freedom of Information Act, for the following reasons.

#### **I. JURISDICTIONAL STATEMENT**

The underlying FOIA request was properly filed under 5 U.S.C. § 552. Pursuant to 40 C.F.R. § 2.104. You have jurisdiction because "If [requesting parties] are dissatisfied with any adverse determination of your request by an office, [they] may appeal that determination to the Headquarters Freedom of Information Staff", and "An adverse determination consists of... a determination on any disputed fee matter, including a denial of a request for a fee waiver." EPA has denied our request for fee waiver or reduction. Further, all procedural rules have been complied with as this is: (1) in writing, (2) properly addressed, (3) clearly identified as an "Appeal Under the Freedom of



Information Act” and includes a copy of the underlying Request, (4) sets forth grounds for reversal, and (5) was filed within 30 days of December 23, 2013, which is the date of EPA’s adverse determination of fee waiver denial sent to us by electronic mail.

## **II. PROCEEDINGS BELOW**

This appeal involves one FOIA Request, sent by electronic mail to EPA’s HQ FOIA office on December 17, 2013, seeking (emphases and footnote in original):

**copies of all text messages** sent to or from a mobile telephone/personal data assistant provided by EPA for the use of any of the a) following EPA employees,<sup>1</sup> b) during the period covering **June 1, 2009 to the date you process this request**, inclusive:

- 1) Joe Goffman, Senior Counsel OAR**
- 2) Janet McCabe**
- 3) Margo Oge, former director of the Office of Transportation and Air Quality (retired late 2012)**
- 4) Cindy Huang, Staff Assistant To the Assistant Administrator**
- 5) Scott Fulton, former EPA General Counsel**
- 6) Steve Page, Director, OAQPS, Research Triangle Park (RTP)**
- 7) Peter Tsirigotis, Director, Sector Policies and Programs Division, OAR: OAQPS, RTP**
- 8) Mike Flynn, Director, Office of Radiation and Indoor Air, EPA HQ**
- 9) Bob Perciasepe**
- 10) Curt Spalding, Regional Administrator EPA Region 1**
- 11) Nancy Grantham, Director, EPA R1, Office of Public Affairs**
- 12) Ira W. Leighton, former deputy RA, Region 1**

---

<sup>1</sup> These titles or identifying language of these employees’ positions at some point during the period covered by this request are to assist with identification, although several held more than one during their EPA employment, and we do not limit our request to their service in the identified positions but instead to the stated time parameters.

**In that request CEI expressed its intention to broadly disseminate the information requested**, including, as follows (**bold**, underscore in original, extensive citation of exemplars of requester's history of such dissemination omitted):

CEI intends to post these records for public scrutiny and otherwise to broadly disseminate the information it obtains under this request by the means described herein....

Requester intends to disseminate the information gathered by this request via media appearances (the undersigned appears regularly, to discuss his work, on national television and national and local radio shows, and weekly on the radio shows "Garrison" on WIBC Indianapolis and the nationally syndicated "Battle Line with Alan Nathan").

Requester also publishes materials based upon its research via print and electronic media, as well as in newsletters to legislators, education professionals, and other interested parties. For a list of exemplar publications, please see <http://cei.org/publications>. Those activities are in fulfillment of CEI's mission. We intend to disseminate the information gathered by this request to the public at large and at no cost through one or more of the following: (a) newsletters; (b) opinion pieces in newspapers or magazines; (c) CEI's websites, which receive approximately 150,000 monthly visitors (appx. 125,000 unique)(See, e.g., [www.openmarket.org](http://www.openmarket.org), one of several blogs operated by CEI providing daily coverage of legal and regulatory issues, and [www.globalwarming.org](http://www.globalwarming.org) (another CEI blog); (d) in-house publications for public dissemination; (e) other electronic journals, including blogs to which our professionals contribute; (f) local and syndicated radio programs dedicated to discussing public policy; (g) to the extent that Congress or states engaged in relevant oversight or related legislative or judicial activities find that which is received noteworthy, it will become part of the public record on deliberations of the legislative branches of the federal and state governments on the relevant issues.

With a foundational, institutional interest in and reputation for its leading role in the relevant policy debates and expertise in the subject of transparency, energy- and environment-related regulatory policies CEI unquestionably has the “specialized knowledge” and “ability and intention” to disseminate the information requested in the broad manner, and to do so in a manner that contributes to the understanding of the “public-at-large.”

EPA assigned this request identification number EPA-HQ-2014-002006, communicated to requester in EPA’s fee waiver denial.

No one from EPA contacted requester seeking further information about CEI’s request or about CEI’s intention to broadly disseminate responsive information, what CEI’s serial assertions of its express intent might possibly otherwise mean, indicated any uncertainty about the intention set forth in these numerous direct assertions of our intent, or otherwise sought to implement President Obama’s serial vow -- repeated in congressional testimony by EPA National FOIA Officer Larry Gottesman -- to implement a bias toward releasing records, consistent with FOIA’s intent as a disclosure and not a withholding statute. Clearly, opting to use fees to deny, particularly in the above-described circumstances, runs starkly counter to these promises of FOIA policy.<sup>2</sup>

By letter delivered via electronic mail on December 23, 2013, EPA denied CEI’s fee waiver provided for by statute, stating that CEI did not in fact make the above-excerpted assertions of its intention to broadly disseminate responsive records. Specifically, EPA

---

<sup>2</sup> TESTIMONY OF LARRY F. GOTTESMAN, NATIONAL FREEDOM OF INFORMATION OFFICER, OFFICE OF ENVIRONMENTAL INFORMATION, U.S. ENVIRONMENTAL PROTECTION AGENCY, House Committee on Oversight and Government Reform, Information Policy, Census, and National Archives Subcommittee, March 18, 2010. [http://epa.gov/ocir/hearings/testimony/111\\_2009\\_2010/2010\\_0318\\_lfg.pdf](http://epa.gov/ocir/hearings/testimony/111_2009_2010/2010_0318_lfg.pdf).

stated in pertinent part: “You have not expressed a specific intent to disseminate the information to the general public.”

As discussed, *infra*, this represents the latest in a demonstrated pattern of improper EPA use of express or constructive denial of fee waivers at the initial determination stage<sup>3</sup> to delay and thereby deny access to public records for certain requests and particularly from certain requesters.<sup>4</sup>

### **III. Standards of Review: All Doubts Must be Resolved in Favor of Disclosure**

It is well-settled that Congress, through FOIA, “sought ‘to open agency action to the light of public scrutiny.’” *DOJ v. Reporters Comm. for Freedom of Press*, 498 U.S. 749, 772 (1989) (*quoting Dep’t of Air Force v. Rose*, 425 U.S. 353, 372 (1976)). The legislative history is replete with reference to the, “‘general philosophy of full agency disclosure’” that animates the statute. *Rose*, 425 U.S. at 360 (*quoting* S.Rep. No. 813, 89<sup>th</sup> Cong., 2<sup>nd</sup> Sess., 3 (1965)). Accordingly, when an agency withholds requested documents, the burden of proof is placed squarely on the agency, with all doubts resolved in favor of the

---

<sup>3</sup> See, e.g., Memorandum from Carolyn Copper, Asst. Inspector General, Office of Program Evaluation, U.S. Env’tl. Prot. Agency Office of Inspector General, to Malcolm D. Jackson, Asst. Adm’r and Chief Information Officer, Office of Environmental Information, U.S. Env’tl. Prot. Agency, *Notification of Evaluation of EPA’s Freedom of Information Act Fee Waiver Process* (Jun. 19, 2013) available at [http://www.epa.gov/oig/reports/notificationMemos/newStarts\\_06-19-13\\_FOIA\\_Fee\\_Waiver\\_Process.pdf](http://www.epa.gov/oig/reports/notificationMemos/newStarts_06-19-13_FOIA_Fee_Waiver_Process.pdf).

<sup>4</sup> As EPA is aware, undersigned counsel Horner assists several groups with their transparency efforts, including FOIA requests. Regardless, notwithstanding numerous EPA implications in other correspondence that this distinction is lost on the Agency, each such request should be considered individually and on its merits. We raise the issues discussed herein due to the appearance in recent months that this has not been the case, which we seek to rectify.

requester. *See, e.g., Federal Open Mkt. Comm. v. Merrill*, 443 U.S. 340, 352 (1979). This burden applies across scenarios and regardless of whether the agency is claiming an exemption under FOIA in whole or in part. *See, e.g., Tax Analysts*, 492 U.S. 136, 142 n. 3 (1989); *Consumer Fed’n of America v. Dep’t of Agriculture*, 455 F.3d 283, 287 (D.C. Cir. 2006); *Burka*, 87 F.3d 508, 515 (D.C. Cir. 1996).

These disclosure obligations are to be accorded added weight in light of the recent Presidential directive to executive agencies to comply with FOIA to the fullest extent of the law specifically cited in my request to EPA to produce responsive documents.

*Presidential Memorandum For Heads of Executive Departments and Agencies*, 75 F.R. § 4683, 4683 (Jan. 21, 2009). As the President emphasized, “a democracy requires accountability, and accountability requires transparency,” and “the Freedom of Information Act... is the most prominent expression of a profound national commitment to ensuring open Government.” Accordingly, the President has directed that FOIA “be administered with a clear presumption: In the face of doubt, openness prevails” and that a “presumption of disclosure should be applied to all decisions involving FOIA.”

#### **IV. EPA Arbitrarily and Capriciously Refused to Grant CEI’s Fee Waiver**

CEI notes that EPA’s denial of a fee waiver in this matter is consistent with the recent experience of undersigned counsel of EPA improperly using denial of fee waivers as a means of delaying or otherwise denying access to records, despite CEI’s and similarly situated groups’ histories of regularly obtaining fee waivers, indeed even when using the same language as in the instant request, which language also has led to at least one other

requester having its fee waiver granted by EPA,<sup>5</sup> and which regularly results in the instant requester's,<sup>6</sup> and other groups', fees being waived by other agencies.

CEI is not alone in this experience,<sup>7</sup> yet EPA's recent actions appear on their face to be specifically prejudicial and retaliatory. The practices detailed immediately below reflect disparate treatment of requests when submitted by undersigned counsel, on behalf of the instant requesters as well as one other group. They began after public embarrassment and media and congressional scrutiny of the Agency for certain practices

---

<sup>5</sup> See, e.g., no fees required by EPA for processing often substantial numbers of records on the same or nearly the same but less robust waiver-request language (ATI/EELI): HQ-2013-008049, R3-2013-008601. See also, HQ-FOI-0152-12 and HQ-FOI-0158-12, in which EPA dropped its initial demand for fees to ATI/EELI on the same or less robust version of the same waiver-request language, two requests that are producing thousands of records over many months but for which EPA knows it cannot obtain fees as those similarly worded fee waiver requests plainly merit the statutorily provided waiver.

<sup>6</sup> See, e.g., no fees required by other agencies for processing often substantial numbers of records on the same or nearly the same but less robust waiver-request language include (CEI): **DoI** (OS-2012-00113, OS-2012-00124, OS-2012-00172, FWS-2012-00380, BLM-2014-00004, BLM-2012-016, BLM: EFTS 2012-00264, CASO 2012-00278, NVSO 2012-00277); **NOAA** 2013-001089, 2013-000297, 2013-000298, 2010-0199, and "Peterson-Stocker letter" FOIA (August 6, 2012 request, no tracking number assigned, records produced); **DoL** (689053, 689056, 691856 (all from 2012)); **FERC** (14-10); **DoE** (HQ-2010-01442-F, 2010-00825-F, HQ-2011-01846, HQ-2012-00351-F, HQ-2014-00161-F, HQ-2010-0096-F, GO-09-060, GO-12-185, HQ-2012-00707-F); **NSF** (10-141); **OSTP** (12-21, 12-43, 12-45, 14-02).

<sup>7</sup> See February 21, 2012 letter from public interest or transparency groups to four federal agencies requesting records regarding a newly developed pattern of fee waiver denials and imposition of "exorbitant fees" under FOIA as a barrier to access, available at <http://images.politico.com/global/2012/03/acluefffeewvrfoialtr.pdf>; see also *National Security Counselors v. CIA* (CV: 12-cv-00284(BAH), filed D.D.C Feb. 22, 2012); see also "Groups Protest CIA's Covert Attack on Public Access," OpenTheGovernment.org, February 23, 2012, <http://www.openthegovernment.org/node/3372>.

followed certain of undersigned's FOIA requests on behalf of CEI<sup>8</sup> and two other groups.<sup>9</sup> While the events described immediately below possibly reflect an extended series of coincidences, they do appear to be part of a continuing practice of disparate

---

<sup>8</sup> See, e.g., Stephen Dinan, *Do Text Messages from Feds Belong on Record? EPA's Chief's Case Opens Legal Battle*, THE WASHINGTON TIMES, Apr. 30, 2011, at A1. Other outlets covering this dissemination include, Peter Foster, *More Good News for Keystone*, NATIONAL POST, Jan. 9, 2013, at 11; Juliet Eilperin, *EPA IG Audits Jackson's Private E-mail Account*, THE WASHINGTON POST, Dec. 19, at A6; James Gill, *From the Same Town, But Universes Apart*, NEW ORLEANS TIMES-PICAYUNE, Jan. 2, 2013, at B1; Kyle Smith, *Hide & Sneak*, THE NEW YORK POST, Jan. 6, 2013, at 23. <http://www.breitbart.com/Big-Government/2013/01/27/EPA-email-Scandal-worse-than-originally-thought>; <http://www.breitbart.com/Big-Government/2013/01/14/epa-lisa-jackson-emails>; <http://www.breitbart.com/Big-Government/2013/02/22/EPA-Releases-Doc-Dump-Of-Black-Papers-On-Former-Chief-s-Alternative-E-Mail-Account>; Christopher C. Horner, *EPA Circles Wagons in 'Richard Windsor' Email Scandal*, Jan. 16, 2013, <http://www.breitbart.com/Big-Government/2013/01/16/What-s-in-a-Name-EPA-Goes-Full-Bunker-in-Richard-Windsor-EMail-Scandal>. See also, Stephen Dinan, *EPA Staff to Retrain on Open Records; Memo Suggests Breach of Policy*, THE WASHINGTON TIMES, Apr. 9, 2013, at A4; Stephen Dinan, *Suit Says EPA Balks at Release of Records; Seeks Evidence of Hidden Messages*, THE WASHINGTON TIMES, Apr. 2, 2013, at A1; Christopher C. Horner, *EPA administrators invent excuses to avoid transparency*, THE WASHINGTON EXAMINER, Nov. 25, 2012, <http://washingtonexaminer.com/epa-administrators-invent-excuses-to-avoid-transparency/article/2514301>, arising out of HQ-FOI-01268-12, HQ-FOI-01269, HQ-FOI-01270-12.

<sup>9</sup> See also, *Public interest group sues EPA for FOIA delays, claims agency ordered officials to ignore requests*, THE WASHINGTON EXAMINER, Jan. 28, 2013, <http://washingtonexaminer.com/public-interest-group-sues-epa-for-foia-delays-claims-agency-ordered-officials-to-ignore-requests/article/2519881>.

application of FOIA's fee waiver provision for certain requesters and particularly undersigned counsel.<sup>10</sup>

The Agency's denials of these targeted groups' fee waivers, including but not limited to CEI, have until very recently been overturned on appeal.<sup>11</sup> Only very recently has EPA taken the next step of denying fees for requesters upon appeal, and that was on the same facially unsupportable grounds as in the instant matter, facially unsupportable because the relevant request also made plain requesters' intent to broadly disseminate.<sup>12</sup>

Also, EPA's record further compounds the appearance that the instant denial is part of prejudicial and improper practice. CEI, which was subject to EPA improperly denying

---

<sup>10</sup> See, Letter from Hon. David Vitter, Ranking Member, S. Comm. on Env't & Pub. Works, Hon. Darrell E. Issa, Chairman, H. Comm. on Oversight & Gov't Reform, Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Technology, to Hon. Arthur A. Elkins, Jr., Reg'l Adm'r, Inspector General, U.S. Env'tl. Prot. Agency (Feb. 7, 2013); see also Memorandum from Carolyn Copper, Asst. Inspector General, Office of Program Evaluation, U.S. Env'tl. Prot. Agency Office of Inspector General, to Malcolm D. Jackson, Asst. Adm'r and Chief Information Officer, Office of Environmental Information, U.S. Env'tl. Prot. Agency, *Notification of Evaluation of EPA's Freedom of Information Act Fee Waiver Process* (Jun. 19, 2013) available at [http://www.epa.gov/oig/reports/notificationMemos/newStarts\\_06-19-13\\_FOIA\\_Fee\\_Waiver\\_Process.pdf](http://www.epa.gov/oig/reports/notificationMemos/newStarts_06-19-13_FOIA_Fee_Waiver_Process.pdf).

We also note, for the record, evidence of internal "protocols" to deal with "such requests" See, e.g., Hon. Sen. David Vitter, "Clearing the Air on an Opaque EPA", *US News*, March 13, 2013, referencing an EPA email obtained by undersigned, instructing EPA FOIA officers on same.

<sup>11</sup> See, e.g., HQ-2013-003087, R6-2013-003663, HQ-FOI-01269, HQ-FOI-01270-12. Only very recently has EPA taken the next step of denying fees for apparently disfavored requesters upon appeal EPA-R10-2014-000344, and EPA-R10-2013-008285, now *FMELC et al. v. EPA*, cv: 13-01778 (RJL)(D.D.C.); these recent denials are on the same facially unsupportable grounds that requesters did not state an intention to broadly disseminate when they expressly and repeatedly did so, in each such request.

<sup>12</sup> See, e.g., EPA-HQ-2014-001664, EPA-R10-2013-008285 (now in litigation as *Free Market Environmental Law Clinic et al. v. EPA*, cv: 13-1778, D.D.C.), EPA-R10-2014-000344, EPA-R6-2013-009363, EPA-HQ-2014-001664. See also, HQ-2013-006008.



fee waiver, filed suit for records relating to EPA's practice of disparate treatment on April 4, 2013;<sup>13</sup> within two weeks and approximately coinciding with initiation of the above-referenced EPA Inspector General inquiry into EPA's disparate treatment, EPA reverted to serially informing CEI that every one of its requests submitted by undersigned counsel since EPA's disparate fee waiver treatment was exposed were "not billable," uniformly resisting to grant or deny even one fee waiver request in this intervening period, even where the requests implicated search and processing activity requiring substantially more than two hours' time.<sup>14</sup> Now that EPA has abandoned this practice, coincidental with the Office of Inspector General nearing conclusion of its written product, EPA of course also squanders taxpayer resources not only at the Agency but now, by forcing litigation, in the judicial system.

Finally, we note that EPA has waived requester CEI's fees for substantial productions arising from requests expressing the same intention, even using the same language as used in the instant request.<sup>15</sup>

---

<sup>13</sup> *Competitive Enterprise Institute v. EPA*, cv: 13-434 (filed April 4, 2013 in D.D.C.) (RJL)).

<sup>14</sup> See, EPA-HQ-2013-009249, EPA-HQ-2013-009235, EPA-HQ-2013-008908, EPA-HQ-2013-008015, EPA-HQ-2013-006937, EPA-HQ-2013-006939, EPA-HQ-2013-006588, EPA-EPA-HQ-2013-005618, HQ-2013-006005, EPA-HQ-2013-004176 (the "fee waiver" FOIA), EPA-HQ-2014-000356, EPA-R8-2014-000358. EPA adopted this new practice on April 19, 2013.

<sup>15</sup> See, e.g., no fees required by EPA for processing often substantial numbers of records on the same or nearly the same but less robust waiver-request language (CEI): EPA-HQ-2013-000606, HQ-FOI-01087-12, EPA-HQ-2013-001343, EPA-R6-2013-00361, EPA-R6-2013-00362, EPA-R6-2013-00363, HQ-FOI-01312-10, R9-2013-007631, HQ-FOI-01268-12, HQ-FOI-01269, HQ-FOI-01270-12. These examples involve EPA either waiving fees, not addressing the fee issue, or denying fee waiver but dropping that posture when requesters sued.

For all of these reasons as well as the below, this is the epitome of arbitrary and capricious application of the law. For the same reasons that EPA's appeals office has historically granted requesters' recent fee waivers in similar requests at the initial determination stage and, more recently after administrative appeal, and fee waiver for CEI using the same language expressing an intention to broadly disseminate, CEI's fees should be waived in the instant matter.

**Disclosure would substantially contribute to the public at large's understanding of governmental operations or activities, on a matter of demonstrable public interest.**

CEI's principal request for waiver or reduction of all costs is pursuant to 5 U.S.C. § 552 (a)(4)(A)(iii) ("Documents shall be furnished without any charge... if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of government and is not primarily in the commercial interest of the requester"); *see also* 40 C.F.R. §2.107(l), and (c).

CEI does not seek these records for a commercial purpose. Requesters are organized and recognized by the Internal Revenue Service as 501(c)3 educational organizations. As such, requesters also have no commercial interest possible in these records. If no commercial interest exists, an assessment of that non-existent interest is not required in any balancing test with the public's interest.

As a non-commercial requester, CEI is entitled to liberal construction of the fee waiver standards. 5 U.S.C.S. § 552(a)(4)(A)(iii), *Perkins v. U.S. Department of Veterans Affairs*, 754 F. Supp. 2d 1 (D.D.C. Nov. 30, 2010).

The public interest fee waiver provision "is to be liberally construed in favor of waivers for noncommercial requesters." *McClellan Ecological Seepage Situation v.*

*Carlucci*, 835 F. 2d 1284, 2184 (9th Cir. 1987). The Requester need not demonstrate that the records would contain any particular evidence, such as of misconduct. Instead, the question is whether the requested information is likely to contribute significantly to public understanding of the operations or activities of the government, period. *See Judicial Watch v. Rosotti*, 326 F. 3d 1309, 1314 (D.C. Cir 2003).

FOIA is aimed in large part at promoting active oversight roles of watchdog public advocacy groups. “The legislative history of the fee waiver provision reveals that it was added to FOIA ‘in an attempt to prevent government agencies from using high fees to discourage certain types of requesters, and requests,’ in particular those from journalists, scholars and nonprofit public interest groups.” *Better Government Ass’n v. State*, 780 F.2d 86, 88-89 (D.C. Cir. 1986) (fee waiver intended to benefit public interest watchdogs), citing to *Ettlinger v. FBI*, 596 F. Supp. 867, 872 (D.Mass. 1984); S. COMM. ON THE JUDICIARY, AMENDING the FOIA, S. REP. NO. 854, 93rd Cong., 2d Sess. 11-12 (1974)).<sup>16</sup>

---

<sup>16</sup> This was grounded in the recognition that the two plaintiffs in that merged appeal were, like Requester, public interest non-profits that “rely heavily and frequently on FOIA and its fee waiver provision to conduct the investigations that are essential to the performance of certain of their primary institutional activities -- publicizing governmental choices and highlighting possible abuses that otherwise might go undisputed and thus unchallenged. These investigations are the necessary prerequisites to the fundamental publicizing and mobilizing functions of these organizations. Access to information through FOIA is vital to their organizational missions.” *Better Gov’t v. State*. They therefore, like Requester, “routinely make FOIA requests that potentially would not be made absent a fee waiver provision”, requiring the court to consider the “Congressional determination that such constraints should not impede the access to information for appellants such as these.” *Id.*

“This is in keeping with the statute’s purpose, which is ‘to remove the roadblocks and technicalities which have been used by... agencies to deny waivers.’” *Citizens for Responsibility & Ethics in Washington v. U.S. Dep’t of Educ.*, 593 F. Supp. 261, 268 (D.D.C. 2009), citing to *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th. Cir. 1987) (quoting 132 Cong. Rec. S16496 (Oct. 15, 1986) (statement of Sen. Leahy)).

Requester’s ability -- as well as many nonprofit organizations, educational institutions and news media that will benefit from disclosure -- to utilize FOIA depends on their ability to obtain fee waivers. For this reason, “Congress explicitly recognized the importance and the difficulty of access to governmental documents for such typically under-funded organizations and individuals when it enacted the ‘public benefit’ test for FOIA fee waivers. This waiver provision was added to FOIA ‘in an attempt to prevent government agencies from using high fees to discourage certain types of requesters and requests,’ in a clear reference to requests from journalists, scholars and, most importantly for our purposes, nonprofit public interest groups. Congress made clear its intent that fees should not be utilized to discourage requests or to place obstacles in the way of such disclosure, forbidding the use of fees as “‘toll gates” on the public access road to information.’” *Better Gov’t Ass’n v. Department of State*.

As the *Better Government* court also recognized, public interest groups employ FOIA for activities “essential to the performance of certain of their primary institutional activities -- publicizing governmental choices and highlighting possible abuses that otherwise might go undisputed and thus unchallenged. These investigations are the

necessary prerequisites to the fundamental publicizing and mobilizing functions of these organizations. Access to information through FOIA is vital to their organizational missions.”

Congress enacted FOIA clearly intending that “fees should not be used for the purpose of discouraging requests for information or as obstacles to disclosure of requested information.” *Ettlinger v. FBI*, citing Conf. Comm. Rep., H.R. Rep. No. 1380, 93d Cong., 2d Sess. 8 (1974) at 8. Improper refusal of fees as a means of withholding records from a FOIA requester constitutes improper withholding. *Ettlinger v. FBI*.

Therefore, “insofar as... [agency] guidelines and standards in question act to discourage FOIA requests and to impede access to information for precisely those groups Congress intended to aid by the fee waiver provision, they inflict a continuing hardship on the non-profit public interest groups who depend on FOIA to supply their lifeblood -- information.” *Better Gov’t v. State* (internal citations omitted). The courts therefore will not permit such application of FOIA requirements that “‘chill’ the ability and willingness of their organizations to engage in activity that is not only voluntary, but that Congress explicitly wished to encourage.” *Id.* As such, agency implementing regulations may not facially or in practice interpret FOIA’s fee waiver provision in a way creating a fee barrier for Requester.

Courts have noted FOIA’s legislative history to find that a fee waiver request is likely to pass muster “if the information disclosed is new; supports public oversight of agency operations, including the quality of agency activities and the effects of agency policy or regulations on public health or safety; or, otherwise confirms or clarifies data on

past or present operations of the government.” *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d at 1284-1286.

This information request meets that description, for reasons both obvious and specified.

**1) The subject matter of the requested records specifically concerns identifiable operations or activities of the government.** The requested records, pertaining to EPA staff preservation (or lack of preservation) of one class of records, text message transcripts, which the public record indicates have never been produced in response to a FOIA or congressional oversight request, a practice now the subject of litigation (*CEI v. EPA*, 13-cv-1532 (RMC)), would contribute significantly to public understanding of the operations or activities of the government about which information there is no other information in the public domain. This is more true given EPA having declined to acknowledge or deny that -- while it claims text messages transcripts *may* be records under, *e.g.*, the Federal Records Act -- they apparently never have been so deemed by any EPA employee at any time, as not one such transcript has been produced in response to any FOIA or congressional oversight request. Our request seeks to answer the question whether any -- including known -- text message transcripts are being preserved. As indicated in our original request, this follows on the heels of information indicating EPA is leaving it up to each employee to destroy text messages, unilaterally, with no safeguard in the system to search such transcripts later for, *e.g.*, FOIA or oversight or regulatory litigation. This creates a system where text messages will never be searched (or produced) in response to any FOIA, oversight or discovery request.

EPA's answer in *CEI v. EPA* supports this interpretation of the record (*see, Memorandum in Support of Defendant's Motion to Dismiss*). The instant request seeks to determine whether this is so, by a) allowing EPA to respond that none of these staff, who the record reflects texted with Gina McCarthy, have in fact preserved any text message transcripts (as we established, through an earlier request, Ms. McCarthy never preserved a text transcript, but in her case making the unique -- for its facial lack of plausibility -- that each of her many thousands of text messages on an EPA-provided phone provided for work-related correspondence were all personal).

Release of these records also directly relates to high-level promises by the President of the United States and the Attorney General to be "the most transparent administration in history."<sup>17</sup> This transparency promise, in its serial incarnations, demanded and spawned widespread media coverage, and then of the reality of the Administration's transparency efforts, and numerous transparency-oriented groups reporting on this performance, prompting further media and public interest (*see, e.g.*, an internet search of "study Obama transparency").

Particularly after undersigned counsel's recent discoveries using FOIA, related publicizing of certain EPA record-management and electronic communication practices and related other efforts to disseminate the information, the public, media, and Congressional oversight bodies have expressed great interest in how widespread are the violations of this pledge of unprecedented transparency and, particularly, in the issue

---

<sup>17</sup> Jonathan Easley, *Obama says his is 'most transparent administration' ever*, THE HILL, Feb. 14, 2013, <http://thehill.com/blogs/blog-briefing-room/news/283335-obama-this-is-the-most-transparent-administration-in-history>.

central to the present request. EPA's answer in *CEI v. EPA* makes this more true, and indeed prompts this request.

This request, when satisfied, will further inform this ongoing public discussion.

Further, CEI is actively analyzing EPA's relevant record creation and preservation practices, specifically whether it has ever produced a text message transcript, or whether it even can given the appearance that all such messages are contemporaneously destroyed by EPA staff assigned the PDAs for work-related correspondence, with no safeguards to allow review for the propriety of the destruction, no ability to search those messages in response to FOIA or congressional oversight requests, and with no apparent regard for NARA's record-keeping schedules as they apply to text message transcripts. The above-cited FOIAs and litigation affirm this. On its face, therefore, information shedding light on this relationship satisfies FOIA's test.

For the aforementioned reasons, potentially responsive records unquestionably reflect "identifiable operations or activities of the government" with a connection that is direct and clear, not remote.

The Department of Justice Freedom of Information Act Guide expressly concedes that this threshold is easily met. There can be no question that this is such a case.

**2) Requesters intend to broadly disseminate responsive information.** As demonstrated herein including in the litany of exemplars of newsworthy FOIA activity requesters have generated with public information, *and as expressly stated already in the original request*, requesters have both the intent and the ability to convey any information



obtained through this request to the public. This was sufficiently clear in our request given the same language historically and across multiple agencies results in fee waiver.

CEI and requesting counsel, particularly for his FOIA work, are regularly cited in newspapers and trade and political publications, representing a practice of broadly disseminating public information obtained under FOIA, which practice requesters intend to continue in the instant matter.<sup>18</sup>

**3) Disclosure is “likely to contribute” to an understanding of specific government operations or activities because the releasable material will be meaningfully informative in relation to the subject matter of the request.** Requesters intend to broadly disseminate responsive information. The requested records have an informative value and are “likely to contribute to an understanding of Federal government operations or activities,” just as did requester’s (and others’) similar FOIA requests, as cited in FNs 6, 11, 14 and 15, *supra*, this issue is of significant and increasing public interest. This is not subject to reasonable dispute.

However, **the Department of Justice’s Freedom of Information Act Guide makes it clear that, in the DoJ’s view, the “likely to contribute” determination**

---

<sup>18</sup> In addition to those items already cited *see also*, Christopher C. Horner, *EPA administrators invent excuses to avoid transparency*, THE WASHINGTON EXAMINER, Nov. 25, 2012, <http://washingtonexaminer.com/epa-administrators-invent-excuses-to-avoid-transparency/article/2514301#.ULOaPYf7L9U>; *see also* Christopher C. Horner, *EPA Circles Wagons in ‘Richard Windsor’ Email Scandal*, BREITBART, Jan. 16, 2013, <http://www.breitbart.com/Big-Government/2013/01/16/What-s-in-a-Name-EPA-Goes-Full-Bunker-in-Richard-Windsor-EMail-Scandal>. *See also*, *100 People to Watch this Fall*, THE HILL, Aug. 7, 2013, <http://thehill.com/business-a-lobbying/315837-100-people-to-watch-this-fall-?start=7>.

**hinges in substantial part on whether the requested documents provide information that is not already in the public domain.** There is no reasonable claim to deny that, to the extent the requested information is available to any parties, this is information held only by EPA's correspondents. It is therefore clear that the requested records are "likely to contribute" to an understanding of your agency's decisions because they are not otherwise accessible other than through a FOIA request.

Further, given the tremendous media interest generated to date in revelations about EPA's record creation and maintenance practices, the notion that disclosure will not significantly inform the public at large about operations or activities of government is facially absurd.<sup>19</sup>

Thus, disclosure and dissemination of this information will facilitate meaningful public participation in the policy debate, therefore fulfilling the requirement that the documents requested be "meaningfully informative" and "likely to contribute" to an understanding of your agency's dealings with interested parties outside the agency and interested -- but not formally involved -- employees who may nonetheless be having an impact on the federal permitting process, state and local processes and/or activism on the issue.

**4) The disclosure will contribute to the understanding of the public at large, as opposed to the understanding of the requester or a narrow segment of interested persons.** Requester has an established practice of utilizing FOIA to educate the public,

---

<sup>19</sup> See, e.g., FN 8, *supra*.

lawmakers, and news media about the government's operations and, in particular and as illustrated in detail above, have brought to light important information about policies grounded in energy and environmental policy.

CEI is dedicated to and has a documented record of promoting the public interest, advocating sensible policies to protect human health and the environment, broadly disseminating public information, and routinely receiving fee waivers under FOIA.

With a demonstrated interest and fast-growing reputation for and record in the relevant policy debates and expertise in the subject of energy- and environment-related regulatory policies, CEI unquestionably has the “specialized knowledge” and “ability and intention” to disseminate the information requested in the broad manner, and to do so in a manner that contributes to the understanding of the “public-at-large.”

**5) The disclosure will contribute “significantly” to public understanding of government operations or activities.** *We repeat and incorporate here by reference the arguments above from the discussion of how disclosure is “likely to contribute” to an understanding of specific government operations or activities.*

As previously explained, the public has no source of information on this issue of whether EPA is preserving any text message transcripts, by any staffer, particularly those who the record shows have texted with Administrator Gina McCarthy, but every single one of whose texts Ms. McCarthy deleted as being not work-related or “records”, despite the parties and equipment/accounts involved and the standard set for preservation of such correspondence by NARA's record-keeping schedules and federal email preservation

practices. Because there is no such information or any such analysis in existence, any increase in public understanding of this issue is a significant contribution to this increasingly important issue as regards the operation and function of government.

Because CEI has no commercial interests of any kind, disclosure can only result in serving the needs of the public interest.

**As such**, requester has stated “with reasonable specificity that their request pertains to operations of the government,” that they intend to broadly disseminate responsive records. “[T]he informative value of a request depends not on there being certainty of what the documents will reveal, but rather on the requesting party having explained with reasonable specificity how those documents would increase public knowledge of the functions of government.” *Citizens for Responsibility & Ethics in Washington v. U.S. Dep’t of Health and Human Services*, 481 F. Supp. 2d 99, 107-109 (D.D.C. 2006).

## **V. EPA Arbitrarily and Capriciously Ignored CEI’s Fee Waiver Request as “Media”**

We also note that EPA simply ignored CEI’s alternate request for fee waiver on the basis that it qualifies as a media representative,<sup>20</sup> refusing to respond whatsoever. This alternative request ensures CEI receives its statutorily provided fee waiver in the event the Agency continues its pattern of delay by wrongfully denying the “public interest”

---

<sup>20</sup> See *EPIC v. DOD*, 241 F.Supp.2d 5 (D.D.C. 2003) (court ruled that the publisher of a bi-weekly electronic newsletter qualified as the media, entitling it to a waiver of fees on its FOIA request); *Forest Guardians v. U.S. Dept. of Interior*, 416 F.3d 1173, 1181-82 (10th Cir. 2005) (fee waiver granted for group that “aims to place the information on the Internet”; “Congress intended the courts to liberally construe the fee waiver requests of noncommercial entities”).

request: CEI has already been recognized for FOIA purposes as a media organization, by the same administration, under the same statute.<sup>21</sup> Yet EPA simply refused to respond, waiving its right now to assess fees. By this practice EPA simply ensures that no processing occurs.

We repeat here by reference our argument for that waiver and note that, by refusing to even respond to that request, EPA has waived its rights to charge fees in this matter consistent with the OPEN Government Act of 2007 (“2007 Amendments”) prohibition on agencies that do not respond to requests within the statutory time period by precluding them from charging search fees (or copying fees for media requesters, who are not subject to search fees). *Bensman v. Nat'l Park Serv.*, No. 10-1910, 806 F. Supp. 2d 31 (D.D.C. Aug. 10, 2011)(“To underscore Congress's belief in the importance of the statutory time limit, the 2007 Amendments declare that ‘[a]n agency shall not assess search fees . . . if the agency fails to comply with any time limit’ of FOIA. § 552(a)(4)(A) (viii)”). *See also*, *Lawyers Comm. for Civil Rights of the San Francisco Bay Area v. U.S. Dep't of the Treasury*, No. 07-2590, 2009, WL 2905963, 2009 U.S. Dist. LEXIS 86348 (N.D. Cal. Sept. 8, 2009)(Defendant waived its right to object to plaintiff's request for a fee waiver where it failed to respond within twenty days of the request.). *And see*, Reporters Committee for Freedom of the Press, Federal Open Government Guide, Response Times, <http://www.rcfp.org/federal-open-government-guide/federal-freedom-information-act/response-times>.

---

<sup>21</sup> *See, e.g.*, Treasury FOIA Nos. 2012-08-053, 2012-08-054.

## VI. CONCLUSION

For the aforementioned reasons, EPA's December 23, 2013 denial of CEI's fee waiver arbitrarily and capriciously violated its obligations under FOIA, and CEI's appeals as provided for in that Act. By statute and regulation, EPA is obligated to reverse this initial determination, grant CEI's request for fee waiver, and conduct its search of all accounts identified or described in our request and provide non-exempt content of responsive records unless withholding is justified by an express exemption from FOIA.

Upon reversal of this initial determination, CEI requests that within 20 working days, EPA provide particularized assurance that it is reviewing some quantity of records with an eye toward production on some estimated schedule, so as to establish some reasonable belief that it is processing our request. 5 U.S.C.A. § 552(a)(6)(A)(i). *See also Muttitt v. U.S. Central Command*, 813 F. Supp. 2d 221, 227 (D.D.C. 2011) (addressing "the statutory requirement that [agencies] provide estimated dates of completion"). EPA must at least gather, review, and inform a requesting party of the scope of potentially responsive records, including the scope of the records it plans to produce and the scope of documents that it plans to withhold under any FOIA exemptions. *See Citizens for Responsible Ethics in Washington v. Federal Election Commission*, 711 F.3d 180, 188 (D.C. Cir. 2013).

Upon reversal of this initial determination, we request EPA initiate a rolling production of records, such that the Agency furnishes records to the undersigned's attention as soon as they are identified, preferably electronically.

If you have any questions please do not hesitate to contact me. I look forward to your timely response.

Sincerely,

A handwritten signature in dark ink, appearing to read 'C. Horner', with a long, sweeping horizontal line extending to the right.

Christopher C. Horner  
Senior Fellow  
Competitive Enterprise Institute  
1899 L Street, NW, 12<sup>th</sup> Floor  
Washington, D.C. 20036  
202.262.4458 (M)  
[chorner@cei.org](mailto:chorner@cei.org)

**From:** [Minoli, Kevin](#)  
**To:** [McDermott, Marna](#)  
**Subject:** FW: CEI FOIA (2013-009249) August 8, 2013  
**Date:** Tuesday, October 29, 2013 5:26:00 PM  
**Importance:** High

---

Let's talk tomorrow. Thanks.

Kevin S. Minoli  
Acting Principal Associate General Counsel  
Office of General Counsel  
Main Office Line: 202-564-8064  
Direct Dial: 202-564-5551

---

**From:** Anderson, Cindy  
**Sent:** Tuesday, October 29, 2013 4:35 PM  
**To:** Minoli, Kevin  
**Cc:** Miller, Kevin  
**Subject:** FW: CEI FOIA (2013-009249) August 8, 2013  
**Importance:** High

Kevin(s) –

(b) (5) DPP, (b) (5) ACP

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Thanks – sorry this message is a jumble; I'm trying to send anything I can type before getting kicked out again.

Cindy  
564-2690

---



**From:** Ketcham-Colwill, Nancy  
**Sent:** Tuesday, October 29, 2013 2:55 PM  
**To:** Anderson, Cindy  
**Cc:** Weinstock, Larry; McDermott, Marna  
**Subject:** RE: CEI FOIA (2013-009249) August 8, 2013

(b) (5) DPP, (b) (5) ACP

[Redacted]

Should we have that discussion? Thanks for your help, Cindy.

---

**From:** Anderson, Cindy  
**Sent:** Tuesday, October 29, 2013 2:21 PM  
**To:** Ketcham-Colwill, Nancy  
**Cc:** Weinstock, Larry  
**Subject:** FW: CEI FOIA (2013-009249) August 8, 2013

Nancy –

(b) (5) DPP, (b) (5) ACP

[Redacted]

?

(b) (5) DPP, (b) (5) ACP

[Redacted]

Please let me know what you think?  
Thanks!

Cindy  
564-2690

---

**From:** Weinstock, Larry  
**Sent:** Tuesday, October 29, 2013 2:14 PM

**To:** Anderson, Cindy  
**Subject:** RE: CEI FOIA (2013-009249) August 8, 2013

(b) (5) DPP, (b) (5) ACP I will be out for the rest of the afternoon.

Larry

---

**From:** Anderson, Cindy  
**Sent:** Tuesday, October 29, 2013 2:07 PM  
**To:** Weinstock, Larry  
**Subject:** FW: CEI FOIA (2013-009249) August 8, 2013

Larry –

(b) (5) DPP, (b) (5) ACP ?

I'll call you separately sometime later this afternoon, after my 2:30 call w/AUSA regarding CEI lawsuit about bills for text messages, to discuss the August 8 FOIA.

Thanks

Cindy  
564-2690

---

**From:** Wachter, Eric  
**Sent:** Tuesday, October 29, 2013 12:44 PM  
**To:** Anderson, Cindy  
**Cc:** Newton, Jonathan; Hope, Brian; Weinstock, Larry  
**Subject:** RE: CEI FOIA (2013-009249) August 8, 2013

Hello, Cindy,

(b) (5) DPP, (b) (5) ACP

. I hope this clears this up.

Thanks,  
Eric

---

**From:** Anderson, Cindy  
**Sent:** Tuesday, October 29, 2013 10:34 AM  
**To:** Newton, Jonathan  
**Cc:** Weinstock, Larry  
**Subject:** CEI FOIA (13-009249) August 8, 2013  
**Importance:** High

Larry & Jonathan –

(b) (5) DPP, (b) (5) ACP  
[Redacted]  
[Redacted]

[Redacted]  
[Redacted]

[Redacted]  
[Redacted]  
[Redacted]  
[Redacted]

[Redacted]  
[Redacted]  
[Redacted]

[Redacted]  
[Redacted]  
[Redacted]

[Redacted]  
[Redacted]  
[Redacted]

Thanks!

Cindy Anderson  
EPA/OGC  
(202) 564-2690

**From:** [Minoli, Kevin](#)  
**To:** [Garbow, Avi](#)  
**Subject:** FW: CEI Sues EPA for Gina McCarthy's Text and Training Records  
**Date:** Monday, July 15, 2013 1:59:00 PM  
**Attachments:** [CourtLink Document US-DIS-DCD 1 13cv1074 .Idx 541927 7.15.2013 130806666.pdf](#)

---

Kevin S. Minoli  
Acting Principal Deputy General Counsel  
Office of General Counsel  
Main Office Line: 202-564-8064  
Direct Dial: 202-564-5551

---

**From:** Kelly, Lynn  
**Sent:** Monday, July 15, 2013 1:27 PM  
**To:** Minoli, Kevin; Ketcham-Colwill, Nancy; Weinstock, Larry; Miller, Kevin  
**Subject:** RE: CEI Sues EPA for Gina McCarthy's Text and Training Records

Just reading now.

Lynn Kelly | US EPA | Office of General Counsel | 1200 Pennsylvania Ave., NW | ARN, Mail Code 2377A  
| Washington DC 20460 | phone: (202) 564-3266

The contents of this e-mail and any attachments to it may contain deliberative-process, attorney-client, attorney work product, or otherwise privileged material. If you are not the intended recipient, or believe you have received this communication in error, please delete the copy you received, and do not print, copy, retransmit, disseminate, or otherwise use the information. Thank you.

---

**From:** Minoli, Kevin  
**Sent:** Monday, July 15, 2013 1:26 PM  
**To:** Ketcham-Colwill, Nancy; Weinstock, Larry; Kelly, Lynn; Miller, Kevin  
**Subject:** Fw: CEI Sues EPA for Gina McCarthy's Text and Training Records

Hey folks- do we have a copy of the complaint?

Kevin S. Minoli  
Acting Principal Deputy General Counsel  
Office of General Counsel  
Main Line: 564-8064  
Direct Dial: 564-5551

---

**From:** Johnson, Alisha  
**Sent:** Monday, July 15, 2013 1:05:26 PM  
**To:** Minoli, Kevin  
**Subject:** Fw: CEI Sues EPA for Gina McCarthy's Text and Training Records

Fyi - (b) (5) DPP, (b) (5) ACP  
[REDACTED]  
[REDACTED] ?

---

**From:** Emily Yehle <[eyehle@eenews.net](mailto:eyehle@eenews.net)>  
**Sent:** Monday, July 15, 2013 1:02:31 PM  
**To:** Johnson, Alisha  
**Subject:** FW: CEI Sues EPA for Gina McCarthy's Text and Training Records

Alisha,

Any comment on this lawsuit? Deadline is 3.

Thanks!

**Emily Yehle**

Reporter

[eyehle@eenews.net](mailto:eyehle@eenews.net)

202-446-0437 (p)

202-737-5299 (f)

---

**Environment & Energy Publishing, LLC**

122 C Street, NW, Suite 722, Washington, DC 20001

[www.eenews.net](http://www.eenews.net) • [www.eenews.tv](http://www.eenews.tv)

EnergyWire, ClimateWire, E&E Daily, Greenwire, E&ENews PM, E&ETV

**From:** Brian McNicoll <[bmac@cei.org](mailto:bmac@cei.org)>  
**Date:** July 15, 2013, 12:01:38 PM EDT  
**To:** <[jplautz@eenews.net](mailto:jplautz@eenews.net)>  
**Subject:** CEI Sues EPA for Gina McCarthy's Text and Training Records



Contact:

Brian McNicoll, 202-331-2765

**[CEI Sues EPA for Gina McCarthy's Text and Training Records](#)**

***Nearing Senate Confirmation Vote, Nominee Remains Shielded by Agency Stonewalling***

WASHINGTON, D.C., July 15, 2013 – The [Competitive Enterprise Institute](#) filed [suit](#) today in federal court to force the Environmental Protection Agency to turn over phone bills for the EPA-issued PDA issued to Gina McCarthy, a top EPA official and President Obama's nominee to serve as the next administrator.

CEI's suit also seeks records EPA has failed to turn over that would reflect whether McCarthy received and/or acknowledged the required training in EPA electronic record use and preservation policies. McCarthy is specifically tasked with ensuring her office complies with these laws and policies, yet apparently not

one of her text messages has ever been produced in response to Freedom of Information or Congressional oversight requests for “all records” or “electronic records.” A similar, contemporaneous request produced “Scholar of Ethics” awards to the false identity assumed by the woman McCarthy seeks to replace, former administrator Lisa Jackson. EPA has failed to provide any evidence of McCarthy receiving the required training.

A Senate vote on McCarthy’s nomination could come as soon as this week despite several unanswered questions involving her electronic correspondence and recordkeeping practices, including why EPA is withholding thousands of her emails about the “war on coal” in a lawsuit and unlawfully refusing to produce even factual information such as the dates, parties and subject matter.

“Obama’s EPA is waving red flags all over the place,” said [Christopher Horner](#), Senior Fellow at CEI and author of “The Liberal War on Transparency,” research for which turned up the ‘Richard Windsor’ fake name email scandal and other evidence of EPA avoiding disclosure requirements. “Ultimately, we will learn if EPA’s problems with non-official email accounts, and accounts not identifying the account holder, extend to their use of private accounts for texting or even destroying this alternative to email, as it seems. Resolving the questions in today’s suit, and about her use of a personal account, should be necessary conditions to moving forward on her nomination. This also would do much to address the growing impression Gina McCarthy has something to hide and that EPA is going to great lengths to help her hide it.”

CEI submitted the IT-training request under the Freedom of Information Act in April, as well as one for text messages from McCarthy’s EPA-issued phone on 18 specific dates. The latter request came after CEI was reliably informed McCarthy was warned to stop texting after concerns about the propriety of messages, specifically those sent on days she appeared before Congress.

EPA has claimed it has no such text messages. CEI then sought McCarthy’s relevant phone bills, which should establish whether she used the text feature as an alternative to email on her EPA-assigned device, including on those dates. In a separate request, presently on administrative appeal, CEI also seeks work-related text messages from McCarthy’s non-EPA-issued phone, which under EPA rules are public records subject to FOIA and which McCarthy is in fact responsible for turning over to EPA without being asked.

EPA has indicated satisfying CEI’s request for phone bills would take two hours or less. But to further expedite matters CEI narrowed the request to seek only those portions that reflect text activity. If those records were created, on any device, EPA must explain what happened between those records being created and their “no records” response. The interim step between creation and claiming “no records,” is that they have been destroyed – a violation of federal law.

EPA has apparently yet to include text messages in response to any request for records whether from Congress or through the FOIA process, although the law plainly says these messages are public records. CEI’s investigation of EPA’s transparency practices has revealed a pattern of resistance to disclosure of its activities. Already this has led to an Inspector General inquiry into EPA’s instant

messaging practices, presumably including whether EPA preserves IMs as required.

“If these bills show that any text messages were in fact sent or received on the EPA device on any of the 18 dates in question, that means EPA is either not turning over records it has been ordered by courts to produce or is destroying those records in violation of the law,” said Horner. “Our suit seeks to help draw EPA out into the open on these important issues and determine whether the reason these records are not being produced is mere nose-thumbing at the public and Congress, or possibly involves Title 18. [Title 18 of the United States Code, the criminal code of federal law, prohibits the destruction of federal records.]”

Horner noted a pattern of efforts on behalf of EPA to protect McCarthy until she can be approved by the Senate. Already, in response to a court order for EPA to turn over about 12,000 emails related to “climate” and “coal,” the dog not barking in those relatively few emails EPA did turn over was McCarthy, even though she is the lieutenant in charge of such matters. Thousands of those emails that were produced were heavily, sometimes comically redacted despite a directive from President Obama that FOIA requests should be treated with “a presumption of disclosure.” These records did nonetheless reveal McCarthy was among the circle with whom Jackson used the false identity “Richard Windsor,” rather than her own name, on email communications with top staffers and key outside allies. Jackson resigned after the court order to produce them, apparently to avoid answering questions about her decision to conduct certain official correspondence as such.

Other EPA executives, including Jim Martin, director of EPA’s Region 8 in Denver, have resigned after having been found during litigation initiated by CEI to have regularly used a private email account to conduct official business. CEI similarly awaits emails from the Region 9 administrator’s Comcast email account which he used for EPA-related correspondence. EPA’s general counsel also resigned the day Horner released copies of screen shots establishing that the Windsor account was installed on Jackson’s EPA computers.

“This particular case is one step on the path to determining the extent to which EPA is not meeting its obligations to keep the public informed,” Horner said. “EPA should have moved matters along by now, particularly with Ms. McCarthy subject to scrutiny for a promotion.”

► **Read the filed complaint [here](#).**



---

CEI is a non-profit, non-partisan public policy group dedicated to the principles of free enterprise and limited government. For more information about CEI, please visit our website, [cei.org](http://cei.org), and blogs, [Globalwarming.org](http://Globalwarming.org) and [OpenMarket.org](http://OpenMarket.org). Follow CEI on Twitter! [Twitter.com/ceidotorg](https://twitter.com/ceidotorg).

This message was sent to [jplautz@eenews.net](mailto:jplautz@eenews.net) from:

Competitive Enterprise Institute | 1899 L Street NW 12th Floor | Washington, DC  
20036

Email Marketing by



[Unsubscribe](#) | [Forward To a Friend](#)



**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

COMPETITIVE ENTERPRISE INSTITUTE )  
1899 L Street, N.W., 12<sup>th</sup> Floor )  
Washington, D.C. 20036 )

Plaintiff, )

v. )

Civil Action No. 13-1074

UNITED STATES ENVIRONMENTAL )  
PROTECTION AGENCY )  
1200 Pennsylvania Avenue, N.W. )  
Washington, D.C. 20460 )

Defendant. )

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

Plaintiff COMPETITIVE ENTERPRISE INSTITUTE (“CEI”) for its complaint against Defendant UNITED STATES ENVIRONMENTAL PROTECTION AGENCY (“EPA” or “the Agency”), alleges as follows:

- 1) This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, to compel production under two FOIA requests seeking certain EPA records relating to compliance with record-keeping laws and related practices by the Agency, and its Assistant Administrator for Air and Radiation Gina McCarthy.
- 2) These records include certification or acknowledgement of electronic record use and/or record-keeping training, and certain bills for Ms. McCarthy’s EPA-issued personal digital assistant or personal data assistant (PDA).

- 3) Text messaging is used as an alternative medium of communication to electronic mail (email), and texting capabilities are specifically provided to certain officials for the purpose of enabling performance of particular official functions.
- 4) Plaintiff has repeatedly shown in recent months that use by EPA officials of personal accounts to conduct EPA-related business is widespread.
- 5) The requested bills, certifications and acknowledgements are “agency records” under federal record-keeping and disclosure laws. They are of significant public interest, especially due to EPA’s recurrent failure to produce text message transcripts in response to FOIA and congressional oversight requests, which raises serious questions whether EPA is maintaining these records as required by law.
- 6) Defendant EPA has provided neither responsive records, nor the substantive response required by statute, to any of these requests sent in April and June of 2013.
- 7) Plaintiff CEI states on information and belief that Ms. McCarthy regularly used text messaging as an alternative to email for work-related communications, and that a senior Agency official cautioned McCarthy to cease using that function, due to concerns about the propriety of her work-related texts, particularly on days when she testified before either the House or Senate.
- 8) In response to an earlier FOIA request (not the subject of this lawsuit),<sup>1</sup> EPA stated to Plaintiff on May 31, 2013, that it has “no records” in the form of text messages sent to or from Ms. McCarthy’s EPA-issued PDA on the eighteen specified dates relevant to the FOIA requests at issue in this matter.
- 9) Compelling EPA to respond will provide the required demonstration whether in fact no such records were created, and otherwise shed light on EPA’s record-keeping

---

<sup>1</sup> This earlier FOIA request had been assigned identification number HQ-2013-00605 by EPA.

practices and compliance with its legal obligations. Specifically, this will help inform the public about why EPA has failed to produce text message records in response to requests that plainly cover them, by indicating whether EPA has been preserving this class of records as required by law but simply not turning them over, or whether it is failing to preserve (*i.e.*, destroying) them, in violation of law and policy.

- 10) Since any such text messages reflected on these bills were sent to or from the current nominee to be EPA's new administrator (who was specifically charged by EPA with responsibility for ensuring its Air Office's compliance with applicable record-keeping law and policy), these records are of significant public interest. This is also true regarding whether Ms. McCarthy fulfilled her obligation to maintain and to produce these records, and/or whether she received the required training setting forth applicable policy.
- 11) Despite the above and in the face of revelations about organized and systemic abuses by senior federal employees to hide from the public their activities, particularly their electronic communications, EPA has failed to provide the required response. Accordingly, Plaintiff files this lawsuit to compel EPA to comply with the law.

### **PARTIES**

- 12) Plaintiff CEI is a public policy research and educational institute in Washington, D.C., dedicated to advancing responsible regulation and in particular economically sustainable environmental policy. CEI's programs include research, investigative journalism and publication, as well as a transparency initiative seeking public records relating to environmental policy and how policymakers use public resources.

- 13) Defendant EPA is a federal agency headquartered in Washington, D.C. whose stated mission is to “protect human health and the environment.”

### **JURISDICTION AND VENUE**

- 14) This Court has jurisdiction pursuant to 5 U.S.C. § 552(a)(4)(B), because this action is brought in the District of Columbia, and 28 U.S.C. § 1331, because the resolution of disputes under FOIA presents a federal question.
- 15) Venue is proper in this Court under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e) because Plaintiff resides in the District of Columbia, and defendant EPA is a federal agency.

### **FURTHER FACTUAL BACKGROUND**

- 16) EPA has not provided any records, or substantive response, to CEI’s FOIA requests for certain of Assistant Administration McCarthy’s phone bills associated with her EPA-provided PDA, or certifications reflecting she has received training on EPA electronic record use and record-keeping policy. Nor has EPA sought or made the case for more time to respond, or for more information.
- 17) To date, Defendant EPA has only acknowledged receipt of the requests, informed CEI that its requests are “non-billable” under FOIA, and said it will respond to the requests at some unspecified future time.<sup>2</sup> (Typically, FOIA requests are non-billable when they can be handled in two hours or less. *See* 5 U.S.C. § 552(a)(4)(A)(iv)).
- 18) Through its determinations that the FOIA requests were non-billable, the EPA effectively conceded that it was able to provide substantive responses to the FOIA request with minimal effort, yet it did not do so.

---

<sup>2</sup> See *infra*, ¶¶ 21-23, 26-30.

- 19) After EPA's response was due it also suggested if CEI narrow the request for phone bills to merely the portions covering text messages the requests it could promptly produce them. CEI agreed to this, but has not received the records.
- 20) Transparency in government is the subject of high-profile vows by the president and attorney general that FOIA will "be administered with a clear presumption: In the face of doubt, openness prevails" (*See* Attorney General Eric Holder, *OIP Guidance, President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines, Creating a "New Era of Open Government"*, [www.justice.gov/oip/foiapost/2009foiapost8.htm](http://www.justice.gov/oip/foiapost/2009foiapost8.htm); *Memorandum for the Heads of Executive Departments*, [www.whitehouse.gov/the\\_press\\_office/Freedom\\_of\\_Information\\_Act](http://www.whitehouse.gov/the_press_office/Freedom_of_Information_Act).)

**Plaintiff's FOIA Request HQ-2013-005618 Seeking Certain Records Documenting Gina McCarthy Electronic Record Use and/or Record-keeping Training**

- 21) On April 17, 2013, CEI submitted a FOIA Request by electronic mail to [hq.foia@epa.gov](mailto:hq.foia@epa.gov), as follows (emphases in original):
- 1) We seek any documentation in EPA's possession that training on EPA information technology (IT) systems was provided to and/or completed by Assistant Administrator for Air and Radiation Gina McCarthy. These would including but not be limited to, e.g. a certificate of completion of and/or signed acknowledgement of receiving training on, e.g., Oracle Collaboration Suite, IBM Sametime, Skillport, or other IT training.
  - 2) We seek any documentation in EPA's possession that Ms. McCarthy had or has IM [Instant Messaging] client software installed on her computer(s)/workstation(s).
  - 3) We seek any documentation in EPA's possession that Ms. McCarthy is or was a registered user of any EPA IM system(s)/network(s) or system(s)/network(s) that include or provide IM.
- 22) EPA has assigned this FOIA request identification number EPA-HQ-2013-005618.

- 23) In a letter dated April 19, 2013, EPA stated in pertinent part: “The cost associated with processing your request does not reach the billable amount. Accordingly, there is no charge associated with processing your request.”
- 24) CEI has received no other response to this request.
- 25) EPA’s substantive response to this request was due on or before May 15, 2013.

**Plaintiff’s FOIA Request HQ-2013-006937 Seeking Certain Bills  
for McCarthy’s EPA-issued PDA**

- 26) On June 3, 2013, CEI submitted a FOIA Request by electronic mail to

[hq.foia@epa.gov](mailto:hq.foia@epa.gov), seeking (footnoted authorities in original):

copies of all invoices or bills associated with the mobile telephone(s) and/or other personal data assistant(s) or personal digital assistant(s) (PDAs) provided by EPA for the use of Assistant Administrator for Air and Radiation Gina McCarthy -- which devices EPA informs employees are in fact covered by FOIA,<sup>3</sup> the Air Office’s compliance with which record-keeping law and policy EPA assigns specifically to Gina McCarthy<sup>4</sup> -- covering the three-year period from July 1, 2009 through June 30, 2012.

- 27) EPA assigned this FOIA request identification number EPA-HQ-2013-006937, in a letter dated June 13, 2013.
- 28) In that same letter, EPA stated in pertinent part, “The Office of the Administrator (OA) will be responding to your request, your request did not reach the minimum billable amount. Accordingly, there is no charge associated with processing your request.”

---

<sup>3</sup> Frequent Questions about Mobile and Portable Devices, and Records, <http://www.epa.gov/records/faqs/pda.htm>.

<sup>4</sup> “Assistant Administrators, Chief Financial Officer, General Counsel, Inspector General, Regional Administrators, and Laboratory/Center/Office Directors are responsible for: ...Implementing a records management program within their area of responsibility to accomplish the objectives identified in federal regulations and EPA policies and procedures.”

Records Management, [www.epa.gov/records/policy/2155/rm\\_policy\\_cio\\_2155\\_1\\_2.pdf](http://www.epa.gov/records/policy/2155/rm_policy_cio_2155_1_2.pdf).

- 29) On July 3, 2013, EPA emailed a letter stating in pertinent part, about the requested phone/PDA bills:

Our search has found that the bills EPA receives are in two distinct parts -- one for phone calls and another for texting...Since the issue you raise in your letter is focused on text messages, we are unsure whether you want the phone call portion of the bill in addition to the text message portion of the bill. The phone call portion of the bill is much larger and more detailed than the text message portions of the bill, and it may take considerable time to review and identify any releasable portions of the phone call portion of the bill. The text message portion of the bill does not raise the same concerns. Please let us know how you would like us to proceed.

- 30) CEI responded by email the same day stating, *in toto*:

Per the letter you attached in the below email, we accept EPA's response and production limited to any portions of the requested bills providing information reflecting text messaging activity.

Please note that EPA's time to provide a substantive response under FOIA, as reaffirmed by e.g. the DC Circuit's April opinion in *CREW v. FEC*, has passed. We are within our rights to sue now to compel production, remind EPA of our intention to protect and pursue all appellate rights none of which we waive or derogate by this reply, and look forward to the required response.

- 31) CEI has not received any further response.

- 32) EPA's substantive response to this request was due on or before July 2, 2013.

### **LEGAL ARGUMENTS**

#### **Bills for EPA-issued PDAs are "Agency Records" Under Federal Record-Keeping and Disclosure Laws, and EPA's Implementing Policies**

- 33) EPA provides certain employees, including Ms. McCarthy, with PDAs for official or otherwise work-related internal or external communications, and text messaging capability as an alternative option to email.
- 34) Text messaging correspondence are agency records and must be maintained and produced as such. *See, e.g.*, National Archives, *Frequently Asked Questions About Instant Messaging*, <http://www.archives.gov/records-mgmt/initiatives/im-faq.html>

(Instant Messaging (IM) content can “qualify as a Federal Record,” since IM “allows users” to “exchange text messages,” which are “machine readable materials” and thus within the “statutory definition of records”); *Frequent Questions about E-Mail and Records*, <http://www.epa.gov/records/faqs/email.htm>; *Frequent Questions about Mobile and Portable Devices, and Records*, [www.epa.gov/records/faqs/pda.htm](http://www.epa.gov/records/faqs/pda.htm); *Memo to All Staff, “Transparency at EPA,”* by Acting Administrator Bob Perciasepe, dated April 8, 2013 (“the Inspector General currently is conducting an audit of the agency’s records management practices and procedures. We have suggested they place focus on electronic records including email and instant messaging. While we have made progress in these areas, we are committed to addressing any concerns or weaknesses that are identified in this audit . . . to strengthen our records management system”).<sup>5</sup>

- 35) Bills for EPA-assigned, taxpayer-funded equipment used by EPA employees for the conduct of official business are also agency records and thus subject to FOIA.

**Defendant EPA Owed and Has Failed to Provide Plaintiff a Meaningful, Productive Response to its Request**

- 36) FOIA provides that a requesting party is entitled to a substantive agency response within twenty working days, affirming the agency is processing the request and intends to comply. It must rise to the level of indicating “that the agency is exercising due diligence in responding to the request...Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to

---

<sup>5</sup> See also April 11, 2008 memorandum from John B. Ellis, EPA, to Paul Wester, National Archives and Records Administration, at 4 (reporting discovery of record-keeping problems); and *Records and ECMS Briefing, EPA Incoming Political Appointees 2009*, [http://www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore\\_id=60afa4b3-3e5d-4e6f-b81e-64998f0d3c67](http://www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=60afa4b3-3e5d-4e6f-b81e-64998f0d3c67).



such person making such request.” (5 U.S.C. § 552(a)(6)(C)(i)). Alternatively, the agency must cite “exceptional circumstances” and request, and make the case for, an extension that is necessary and proper to the specific request. *See, e.g., Buc v. FDA*, 762 F.Supp.2d 62, 67-73 (D.D.C. 2011).

- 37) EPA regulations state, *inter alia*, “(a) Unless the Agency and the requester have agreed otherwise, or when unusual circumstances exist as provided in paragraph (e) of this section, EPA offices will respond to requests no later than 20 working days from the date the request is received and logged in by the appropriate FOI Office. EPA will ordinarily respond to requests in the order in which they were received. If EPA fails to respond to your request within the 20 working day period, or any authorized extension of time, you may seek judicial review to obtain the records without first making an administrative appeal.” 40 C.F.R. § 2.104.
- 38) Within 20 working days EPA must at least have informed the requesting party of the scope of potentially responsive records, including the scope of the records it plans to produce and the scope of documents that it plans to withhold under any FOIA exemptions. *See Citizens for Responsible Ethics in Washington v. Federal Election Commission*, 711 F.3d 180, 186 (D.C. Cir. 2013)(“CREW”). That information should include an estimated schedule for completion of the production. *See* 5 U.S.C. § 552(a)(6)(A)(i); *Muttitt v. U.S. Central Command*, 813 F. Supp. 2d 221, 227 (D.D.C. 2011) (addressing “the statutory requirement that [agencies] provide estimated dates of completion”).

- 39) FOIA specifically requires EPA to have, by this time, provided CEI with particularized and substantive determinations, including its reasoning, as well as notice of CEI's right to appeal. *See CREW*, 711 F.3d at 186.
- 40) EPA owed CEI substantive responses to its requests on or before May 15, 2013 (EPA-HQ-2013-005618), and July 2, 2013 (EPA-HQ-2013-006937).
- 41) After acknowledging CEI's requests, EPA did not substantively respond, or order production of responsive records, or indicate that a certain quantity of records was being reviewed with an eye toward production on some estimated schedule. Nor has it sought and made its case(s) for an extension of time to respond to the request as required when "exceptional circumstances" exist.

**Having Failed to Properly Respond to Plaintiff's Requests, Defendant EPA Owes Plaintiff Responsive Records**

- 42) In short, EPA has provided no responsive records or substantive responses to CEI. Due to this failure to substantively respond to CEI's requests, CEI need not administratively appeal, but instead may seek relief from this Court, under well-established precedent.
- 43) Thus, EPA is now legally required to provide CEI records responsive to its requests.

**FIRST CLAIM FOR RELIEF**

**Duty to Release Certain Described Records (EPA-HQ-2013-005618 and EPA-HQ-2013-006937) -- Declaratory Judgment**

- 44) Plaintiff re-alleges paragraphs 1-43 as if fully set out herein.
- 45) FOIA requires all doubts to be resolved in favor of disclosure. It allows the citizenry to learn "what their government is up to." *NRA v. Favish* 541 U.S. 157, 171 (quoting *U.S. Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 773 (1989)). The act is designed to "pierce the veil of administrative

secrecy and to open agency action to the light of scrutiny.” *Dep’t of the Air Force v. Rose*, 425 U.S. 352 (1976). It is a transparency-forcing law, consistent with “the basic policy that disclosure, not secrecy, is the dominant objective of the Act.” *Id.*

- 46) Plaintiff has sought and been denied production of responsive records reflecting the conduct of official business.
- 47) Plaintiff has a statutory right to the information it seeks.
- 48) Defendant failed to provide Plaintiff responsive records or any substantive response.
- 49) Plaintiff has exhausted its administrative remedies.
- 50) Plaintiff asks this Court to enter a judgment declaring that
  - i. EPA certification or acknowledgement of electronic record use and/or record-keeping training, and phone or PDA bills as specifically described in Plaintiff’s requests EPA-HQ-2013-005618 and EPA-HQ-2013-006937, and any attachments thereto, are public records, and as such, are subject to release under FOIA;
  - ii. EPA must release those requested records;
  - iii. EPA’s denial of Plaintiff’s FOIA request seeking the described records is not reasonable, and does not satisfy EPA’s obligations under FOIA; and
  - iv. EPA’s refusal to produce the requested records is unlawful.

### **SECOND CLAIM FOR RELIEF**

#### **Release of Certain Described Records Duty to Release Certain Described Records (EPA-HQ-2013-005618 and EPA-HQ-2013-006937) -- Injunctive Relief**

- 51) Plaintiff re-alleges paragraphs 1-50 as if fully set out herein.
- 52) Plaintiff is entitled to injunctive relief compelling Defendant to produce all records in its possession responsive to Plaintiff’s FOIA request.
- 53) This Court should enter an injunction ordering the Defendant to produce to Plaintiff within 10 business days of the date of the order, the requested certification or acknowledgement of electronic record use and/or record-keeping training, phone or PDA bills records described in Plaintiff’s requests EPA-HQ-2013-005618 and EPA-HQ-2013-006937, and any attachments thereto.

**THIRD CLAIM FOR RELIEF**  
**Costs And Fees – Injunctive Relief**

- 54) Plaintiff re-alleges paragraphs 1-53 as if fully set out herein.
- 55) Pursuant to 5 U.S.C. § 552(a)(4)(E), the Court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.
- 56) This Court should enter an injunction ordering the Defendant to pay reasonable attorney fees and other litigation costs reasonably incurred in this case.
- 57) Plaintiff has a statutory right to the records that it seeks, Defendant has not fulfilled its statutory obligations to provide the records or a substantive response, and there is no legal basis for withholding the records.

WHEREFORE, Plaintiff requests the declaratory and injunctive relief herein sought, and an award for its attorney fees and costs and such other and further relief as the Court shall deem proper.

Respectfully submitted this 15<sup>th</sup> day of July, 2013,



Christopher C. Horner  
D.C. Bar No. 440107  
1899 L Street, NW, 12<sup>th</sup> Floor  
Washington, D.C. 20036  
(202) 262-4458  
[chris.horner@cei.org](mailto:chris.horner@cei.org)



Hans Bader, D.C. Bar No. 466545  
Sam Kazman, D.C. Bar No. 946376  
Competitive Enterprise Institute  
1899 L St., N.W., 12<sup>th</sup> Floor  
Washington, D.C. 20036  
(202) 331-2278, [hbader@cei.org](mailto:hbader@cei.org)  
Attorneys for Plaintiff

## CIVIL COVER SHEET

JS-44 (Rev. 3/13 DC)

<b>I. (a) PLAINTIFFS</b> COMPETITIVE ENTERPRISE INSTITUTE  (b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF <u>Wash., D.C.</u> (EXCEPT IN U.S. PLAINTIFF CASES)  (c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER) Hans Bader Competitive Enterprise Institute 1899 L Street, NW, 12th Floor, Washington, D.C. 20036 (202) 331-2278	<b>DEFENDANTS</b> UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT <u>Washington DC</u> (IN U.S. PLAINTIFF CASES ONLY) <small>NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED</small>  ATTORNEYS (IF KNOWN)																								
<b>II. BASIS OF JURISDICTION</b> (PLACE AN X IN ONE BOX ONLY)	<b>III. CITIZENSHIP OF PRINCIPAL PARTIES</b> (PLACE AN X IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT) <b>FOR DIVERSITY CASES ONLY!</b>																								
<input type="radio"/> 1 U.S. Government Plaintiff  <input checked="" type="radio"/> 2 U.S. Government Defendant  <input type="radio"/> 3 Federal Question (U.S. Government Not a Party)  <input type="radio"/> 4 Diversity (Indicate Citizenship of Parties in item III)	<table style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th></th> <th style="text-align: center;">PTF</th> <th style="text-align: center;">DFT</th> <th></th> <th style="text-align: center;">PTF</th> <th style="text-align: center;">DFT</th> </tr> </thead> <tbody> <tr> <td>Citizen of this State</td> <td style="text-align: center;"><input type="radio"/> 1</td> <td style="text-align: center;"><input type="radio"/> 1</td> <td>Incorporated or Principal Place of Business in This State</td> <td style="text-align: center;"><input type="radio"/> 4</td> <td style="text-align: center;"><input type="radio"/> 4</td> </tr> <tr> <td>Citizen of Another State</td> <td style="text-align: center;"><input type="radio"/> 2</td> <td style="text-align: center;"><input type="radio"/> 2</td> <td>Incorporated and Principal Place of Business in Another State</td> <td style="text-align: center;"><input type="radio"/> 5</td> <td style="text-align: center;"><input type="radio"/> 5</td> </tr> <tr> <td>Citizen or Subject of a Foreign Country</td> <td style="text-align: center;"><input type="radio"/> 3</td> <td style="text-align: center;"><input type="radio"/> 3</td> <td>Foreign Nation</td> <td style="text-align: center;"><input type="radio"/> 6</td> <td style="text-align: center;"><input type="radio"/> 6</td> </tr> </tbody> </table>		PTF	DFT		PTF	DFT	Citizen of this State	<input type="radio"/> 1	<input type="radio"/> 1	Incorporated or Principal Place of Business in This State	<input type="radio"/> 4	<input type="radio"/> 4	Citizen of Another State	<input type="radio"/> 2	<input type="radio"/> 2	Incorporated and Principal Place of Business in Another State	<input type="radio"/> 5	<input type="radio"/> 5	Citizen or Subject of a Foreign Country	<input type="radio"/> 3	<input type="radio"/> 3	Foreign Nation	<input type="radio"/> 6	<input type="radio"/> 6
	PTF	DFT		PTF	DFT																				
Citizen of this State	<input type="radio"/> 1	<input type="radio"/> 1	Incorporated or Principal Place of Business in This State	<input type="radio"/> 4	<input type="radio"/> 4																				
Citizen of Another State	<input type="radio"/> 2	<input type="radio"/> 2	Incorporated and Principal Place of Business in Another State	<input type="radio"/> 5	<input type="radio"/> 5																				
Citizen or Subject of a Foreign Country	<input type="radio"/> 3	<input type="radio"/> 3	Foreign Nation	<input type="radio"/> 6	<input type="radio"/> 6																				

## IV. CASE ASSIGNMENT AND NATURE OF SUIT

(Place an X in one category, A-N, that best represents your Cause of Action and one in a corresponding Nature of Suit)

<input type="radio"/> <b>A. Antitrust</b>  <input type="checkbox"/> 410 Antitrust	<input type="radio"/> <b>B. Personal Injury/Malpractice</b>  <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Medical Malpractice <input type="checkbox"/> 365 Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Product Liability	<input type="radio"/> <b>C. Administrative Agency Review</b>  <input type="checkbox"/> 151 Medicare Act  <u>Social Security</u> <input type="checkbox"/> 861 HIA (1395m) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) <u>Other Statutes</u> <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 890 Other Statutory Actions (If Administrative Agency is Involved)	<input type="radio"/> <b>D. Temporary Restraining Order/Preliminary Injunction</b>  Any nature of suit from any category may be selected for this category of case assignment.  *(If Antitrust, then A governs)*
<input type="radio"/> <b>E. General Civil (Other)</b> OR <input type="radio"/> <b>F. Pro Se General Civil</b>			
<u>Real Property</u> <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent, Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property  <u>Personal Property</u> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<u>Bankruptcy</u> <input type="checkbox"/> 422 Appeal 27 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157  <u>Prisoner Petitions</u> <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Conditions <input type="checkbox"/> 560 Civil Detainee – Conditions of Confinement  <u>Property Rights</u> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark  <u>Federal Tax Suits</u> <input type="checkbox"/> 870 Taxes (US plaintiff or defendant) <input type="checkbox"/> 871 IRS-Third Party 26 USC 7609	<u>Forfeiture/Penalty</u> <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other  <u>Other Statutes</u> <input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 430 Banks & Banking <input type="checkbox"/> 450 Commerce/ICC Rates/etc. <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions <input type="checkbox"/> 470 Racketeer Influenced & Corrupt Organization	<input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Satellite TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes <input type="checkbox"/> 890 Other Statutory Actions (if not administrative agency review or Privacy Act)

<input type="radio"/> <b>G. Habeas Corpus/ 2255</b>  <input type="checkbox"/> 530 Habeas Corpus – General <input type="checkbox"/> 510 Motion/Vacate Sentence <input type="checkbox"/> 463 Habeas Corpus – Alien Detainee	<input type="radio"/> <b>H. Employment Discrimination</b>  <input type="checkbox"/> 442 Civil Rights – Employment (criteria: race, gender/sex, national origin, discrimination, disability, age, religion, retaliation)  <i>*(If pro se, select this deck)*</i>	<input type="radio"/> <b>I. FOIA/Privacy Act</b>  <input checked="" type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 890 Other Statutory Actions (if Privacy Act)  <i>*(If pro se, select this deck)*</i>	<input type="radio"/> <b>J. Student Loan</b>  <input type="checkbox"/> 152 Recovery of Defaulted Student Loan (excluding veterans)
<input type="radio"/> <b>K. Labor/ERISA (non-employment)</b>  <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 740 Labor Railway Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	<input type="radio"/> <b>L. Other Civil Rights (non-employment)</b>  <input type="checkbox"/> 441 Voting (if not Voting Rights Act) <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 445 Americans w/Disabilities – Employment <input type="checkbox"/> 446 Americans w/Disabilities – Other <input type="checkbox"/> 448 Education	<input type="radio"/> <b>M. Contract</b>  <input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholder's Suits <input type="checkbox"/> 190 Other Contracts <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<input type="radio"/> <b>N. Three-Judge Court</b>  <input type="checkbox"/> 441 Civil Rights – Voting (if Voting Rights Act)

**V. ORIGIN**  
☒ 1 Original Proceeding  
 ☐ 2 Remand from State Court  
 ☐ 3 Remanded from Appellate Court  
 ☐ 4 Reinstated or Reopened  
 ☐ 5 Transferred from another district (specify)  
 ☐ 6 Multi-district Litigation  
 ☐ 7 Appeal to District Judge from Mag. Judge

**VI. CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE.)**  
 5 U.S.C. § 552 (refusal to comply with Freedom of Information Act request)

<b>VII. REQUESTED IN COMPLAINT</b>	CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 <input type="checkbox"/>	DEMAND \$ _____ JURY DEMAND: _____	Check YES only if demanded in complaint YES <input type="checkbox"/> NO <input checked="" type="checkbox"/>
------------------------------------	--	---------------------------------------	--

<b>VIII. RELATED CASE(S) IF ANY</b>	(See instruction)	YES <input type="checkbox"/> NO <input checked="" type="checkbox"/>	If yes, please complete related case form
-------------------------------------	-------------------	---	---

DATE: 7/15/2013	SIGNATURE OF ATTORNEY OF RECORD: <u>Hans Baden</u>
-----------------	--

**INSTRUCTIONS FOR COMPLETING CIVIL COVER SHEET JS-44**  
 Authority for Civil Cover Sheet

The JS-44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and services of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. Listed below are tips for completing the civil cover sheet. These tips coincide with the Roman Numerals on the cover sheet.

- I.** COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF/DEFENDANT (b) County of residence: Use 11001 to indicate plaintiff if resident of Washington, DC, 88888 if plaintiff is resident of United States but not Washington, DC, and 99999 if plaintiff is outside the United States.
- III.** CITIZENSHIP OF PRINCIPAL PARTIES: This section is completed only if diversity of citizenship was selected as the Basis of Jurisdiction under Section II.
- IV.** CASE ASSIGNMENT AND NATURE OF SUIT: The assignment of a judge to your case will depend on the category you select that best represents the primary cause of action found in your complaint. You may select only one category. You must also select one corresponding nature of suit found under the category of the case.
- VI.** CAUSE OF ACTION: Cite the U.S. Civil Statute under which you are filing and write a brief statement of the primary cause.
- VIII.** RELATED CASE(S), IF ANY: If you indicated that there is a related case, you must complete a related case form, which may be obtained from the Clerk's Office.

Because of the need for accurate and complete information, you should ensure the accuracy of the information provided prior to signing the form.

---

---

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

COMPETITIVE ENTERPRISE INSTITUTE

*Plaintiff*

v.

United States Environmental Protection Agency

*Defendant*

)  
)  
)  
)  
)  
)  
)

Civil Action No. 13-1074

**SUMMONS IN A CIVIL ACTION**

To: *(Defendant's name and address)*

U.S. Attorney for the District of Columbia  
Attn: Civil Process Clerk.  
501 3rd Street, NW, 4th Floor  
Washington, D.C. 20530

A lawsuit has been filed against you.

Within 30 days after service of this summons on you (not counting the day you received it) you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Christopher C. Horner & Hans Bader  
Competitive Enterprise Institute  
1899 L Street, NW, 12th Floor  
Washington, D.C. 20036

If you fail to respond, judgment by default may be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

*ANGELA D. CAESAR, CLERK OF COURT*

Date: \_\_\_\_\_

\_\_\_\_\_  
*Signature of Clerk or Deputy Clerk*

Civil Action No. 13-1074

**PROOF OF SERVICE***(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))*

This summons for *(name of individual and title if any)* \_\_\_\_\_  
 was received by me on *(date)* \_\_\_\_\_.

☐ I personally served the summons on the individual at *(place)* \_\_\_\_\_  
 \_\_\_\_\_ on *(date)* \_\_\_\_\_; or

☐ I left the summons at the individual's residence or usual place of abode with *(name)* \_\_\_\_\_  
 \_\_\_\_\_, a person of suitable age and discretion who resides there,  
 on *(date)* \_\_\_\_\_, and mailed a copy to the individual's last known address; or

☐ I served the summons on *(name of individual)* \_\_\_\_\_, who is  
 designated by law to accept service of process on behalf of *(name of organization)* \_\_\_\_\_  
 \_\_\_\_\_ on *(date)* \_\_\_\_\_; or

☐ I returned the summons unexecuted because \_\_\_\_\_; or

☐ Other *(specify)*: \_\_\_\_\_.

My fees are \$ \_\_\_\_\_ for travel and \$ \_\_\_\_\_ for services, for a total of \$ \_\_\_\_\_ 0.00.

I declare under penalty of perjury that this information is true.

Date: \_\_\_\_\_

\_\_\_\_\_  
*Server's signature*

\_\_\_\_\_  
*Printed name and title*

\_\_\_\_\_  
*Server's address*

Additional information regarding attempted service, etc:



---

---

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

COMPETITIVE ENTERPRISE INSTITUTE

*Plaintiff*

v.

United States Environmental Protection Agency

*Defendant*

)  
)  
)  
)  
)  
)  
)

Civil Action No. 13-1074

**SUMMONS IN A CIVIL ACTION**

To: *(Defendant's name and address)*

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
1200 Pennsylvania Avenue, N.W.  
Ariel Rios Building  
Washington, D.C. 20460

A lawsuit has been filed against you.

Within 30 days after service of this summons on you (not counting the day you received it) you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Christopher C. Horner & Hans Bader  
Competitive Enterprise Institute  
1899 L Street, NW, 12th Floor  
Washington, D.C. 20036

If you fail to respond, judgment by default may be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

*ANGELA D. CAESAR, CLERK OF COURT*

Date: \_\_\_\_\_

\_\_\_\_\_  
*Signature of Clerk or Deputy Clerk*

Civil Action No. 13-1074

**PROOF OF SERVICE***(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))*

This summons for *(name of individual and title if any)* \_\_\_\_\_  
 was received by me on *(date)* \_\_\_\_\_.

☐ I personally served the summons on the individual at *(place)* \_\_\_\_\_  
 \_\_\_\_\_ on *(date)* \_\_\_\_\_; or

☐ I left the summons at the individual's residence or usual place of abode with *(name)* \_\_\_\_\_  
 \_\_\_\_\_, a person of suitable age and discretion who resides there,  
 on *(date)* \_\_\_\_\_, and mailed a copy to the individual's last known address; or

☐ I served the summons on *(name of individual)* \_\_\_\_\_, who is  
 designated by law to accept service of process on behalf of *(name of organization)* \_\_\_\_\_  
 \_\_\_\_\_ on *(date)* \_\_\_\_\_; or

☐ I returned the summons unexecuted because \_\_\_\_\_; or

☐ Other *(specify)*: \_\_\_\_\_.

My fees are \$ \_\_\_\_\_ for travel and \$ \_\_\_\_\_ for services, for a total of \$ \_\_\_\_\_ 0.00.

I declare under penalty of perjury that this information is true.

Date: \_\_\_\_\_

\_\_\_\_\_  
*Server's signature*

\_\_\_\_\_  
*Printed name and title*

\_\_\_\_\_  
*Server's address*

Additional information regarding attempted service, etc:

---

---

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

COMPETITIVE ENTERPRISE INSTITUTE

*Plaintiff*

v.

United States Environmental Protection Agency

*Defendant*

)  
)  
)  
)  
)  
)  
)

Civil Action No. 13-1074

**SUMMONS IN A CIVIL ACTION**

To: *(Defendant's name and address)*

Attorney General Eric Holder  
950 Pennsylvania Ave., NW, Room 511  
Washington, D.C. 20530

A lawsuit has been filed against you.

Within 30 days after service of this summons on you (not counting the day you received it) you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Christopher C. Horner & Hans Bader  
Competitive Enterprise Institute  
1899 L Street, NW, 12th Floor  
Washington, D.C. 20036

If you fail to respond, judgment by default may be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

*ANGELA D. CAESAR, CLERK OF COURT*

Date: \_\_\_\_\_

\_\_\_\_\_  
*Signature of Clerk or Deputy Clerk*

Civil Action No. 13-1074

**PROOF OF SERVICE***(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))*

This summons for *(name of individual and title if any)* \_\_\_\_\_  
 was received by me on *(date)* \_\_\_\_\_.

☐ I personally served the summons on the individual at *(place)* \_\_\_\_\_  
 \_\_\_\_\_ on *(date)* \_\_\_\_\_; or

☐ I left the summons at the individual's residence or usual place of abode with *(name)* \_\_\_\_\_  
 \_\_\_\_\_, a person of suitable age and discretion who resides there,  
 on *(date)* \_\_\_\_\_, and mailed a copy to the individual's last known address; or

☐ I served the summons on *(name of individual)* \_\_\_\_\_, who is  
 designated by law to accept service of process on behalf of *(name of organization)* \_\_\_\_\_  
 \_\_\_\_\_ on *(date)* \_\_\_\_\_; or

☐ I returned the summons unexecuted because \_\_\_\_\_; or

☐ Other *(specify)*: \_\_\_\_\_.

My fees are \$ \_\_\_\_\_ for travel and \$ \_\_\_\_\_ for services, for a total of \$ \_\_\_\_\_ 0.00.

I declare under penalty of perjury that this information is true.

Date: \_\_\_\_\_

\_\_\_\_\_  
*Server's signature*

\_\_\_\_\_  
*Printed name and title*

\_\_\_\_\_  
*Server's address*

Additional information regarding attempted service, etc:

**From:** [Minoli, Kevin](#)  
**To:** [Jones, Gail-R](#)  
**Subject:** FW: CEI v EPA: Text Message Filings  
**Date:** Tuesday, February 11, 2014 11:03:00 AM  
**Attachments:** [11 - CEI's Opp to Mot to Dismiss.pdf](#)  
[12 - CEI's Proposed Order.pdf](#)  
[13 - CEI's Mot for Leave to File Am Compl.pdf](#)  
[13.1 - Proposed Am Compl.pdf](#)  
[13.2 - Proposed Order.pdf](#)

---

Can you please print these attachments for me? Thanks, Kevin

Kevin S. Minoli  
Acting Principal Associate General Counsel  
Office of General Counsel  
Main Office Line: 202-564-8064  
Direct Dial: 202-564-5551

---

**From:** Kelly, Lynn  
**Sent:** Tuesday, February 11, 2014 10:30 AM  
**To:** Miller, Kevin  
**Cc:** Minoli, Kevin  
**Subject:** FW: CEI v EPA: Text Message Filings

FYI-

(b) (5) DPP, (b) (5) ACP, (b) (5) AWP  
(b) (5) DPP, (b) (5) ACP, (b) (5) AWP

Please let me know if you have any questions at this point.

Lynn Kelly | US EPA | Office of General Counsel | 1200 Pennsylvania Ave., NW | WJC North, Mail Code 2377A | Washington DC 20460 | phone: (202) 564-3266



The contents of this e-mail and any attachments to it may contain deliberative-process, attorney-client, attorney work product, or otherwise privileged material. If you are not the intended recipient, or believe you have received this communication in error, please delete the copy you received, and do not print, copy, retransmit, disseminate, or otherwise use the information. Thank you.

---

**From:** Schwei, Daniel S. (CIV) [<mailto:Daniel.S.Schwei@usdoj.gov>]  
**Sent:** Tuesday, February 11, 2014 8:56 AM  
**To:** Kelly, Lynn  
**Cc:** Shapiro, Elizabeth (CIV)  
**Subject:** CEI v EPA: Text Message Filings

Lynn,

Attached here are CEI's filings from yesterday. (b) (5) DPP, (b) (5) ACP, (b) (5) AWP



Thanks,  
Daniel

**Daniel Schwei**  
Trial Attorney  
United States Department of Justice  
Civil Division, Federal Programs Branch  
Tel: 202-305-8693  
Fax: 202-616-8470

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

COMPETITIVE ENTERPRISE INSTITUTE	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 13-1532 (RMC)
	)	
UNITED STATES ENVIRONMENTAL	)	
PROTECTION AGENCY	)	
	)	
Defendant.	)	

**[PROPOSED] ORDER**

Upon consideration of Plaintiff’s motion to file an amended complaint, and any response and reply thereto, it is hereby ORDERED that Plaintiff’s motion is GRANTED and that the Plaintiff shall be permitted to file its amended complaint.

Dated: _____	_____
	The Honorable Rosemary M. Collyer
	United States District Judge

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

COMPETITIVE ENTERPRISE INSTITUTE  
1899 L Street, N.W., 12<sup>th</sup> Floor  
Washington, D.C. 20036

Plaintiff,

V.

Civil Action No. 13-1532

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460

Defendant.

**AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF  
AND WRIT OF MANDAMUS**

Plaintiff COMPETITIVE ENTERPRISE INSTITUTE (“CEI”) for its complaint against Defendant UNITED STATES ENVIRONMENTAL PROTECTION AGENCY (“EPA” or “the Agency”), alleges as follows:

- 1) This is an action to enjoin and prevent the destruction of certain EPA text message transcripts (“texts” or “text messages”), by EPA pursuant to a policy and practice that violates the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and the Federal Records Act (“FRA”).<sup>1</sup>
- 2) On April 26, 2013, CEI submitted a FOIA request seeking text messages created on an account associated with an EPA-assigned personal digital assistant or personal data assistant (PDA), and sent or received by then-Assistant Administrator for Air and Radiation Gina McCarthy, on eighteen specified dates (Ms. McCarthy has since been promoted to EPA

<sup>1</sup> See 44 U.S.C. §§ 2101 *et seq.*, 2901 *et seq.*, 3101 *et seq.*, 3301 *et seq.*



Administrator). On August 19, 2013, after obtaining documents indicating former EPA Administrator Lisa P. Jackson sent/received EPA-related text messages on May 27, 2010, CEI submitted another request for copies of text messages, this time for “copies of all EPA-related text messages sent and/or received by” Jackson on that date.

- 3) Defendant EPA has not provided any of the records responsive to either FOIA request. Instead, it has declared “no records” exist responsive to either request, because the Agency employees have destroyed them as part of a policy and practice of destroying such records, in violation of the FRA and FOIA. That is so even though both of the above EPA officials sent/received EPA-related text messages on EPA-provided accounts/devices assigned to them for EPA business.
- 4) EPA has subsequently produced documents to plaintiff revealing that Ms. McCarthy sent/received many thousands of text messages using her EPA-provided PDA, none of which EPA preserved. (This information was produced in response to a separate FOIA request, HQ-2013-006937, seeking phone bills related to Ms. McCarthy’s text messages. Plaintiff has not obtained any billing information regarding Ms. Jackson’s account(s)).
- 5) Text messaging is provided to certain EPA officials as an alternative medium of communication to email, both means which are provided specifically for the purpose of enabling performance of official functions. For example, in the discrete May 27, 2010 text message plaintiff became aware of former EPA Administrator Lisa Jackson used her text messaging function to discuss a potential green-jobs opportunity for a “cotton absorbent company” whose CEO she apparently met at a “Climate Rally” in her capacity as EPA administrator. But when plaintiff sought those very text messages referenced in an email obtained under FOIA and addressed to Jackson in her capacity as “Administrator Jackson,”

EPA issued a “no-records” response. This reflected that the texts, which like email are “created” when sent or received, were destroyed by EPA.

- 6) EPA further indicated in response to plaintiff that while text messages can be federal records, just like email, unlike email none of the thousands of text messages plaintiff requested were in fact preserved, despite many having a facial relationship to EPA’s work, on the grounds that such communications are “unrecord material not subject to the Federal Records Act,”<sup>2</sup> and that it is EPA’s position to allow Agency officials to destroy their correspondence, which represents the Agency’s sole copy of such correspondence.
- 7) EPA does not permit employees to destroy the Agency’s sole copy of email, although no inherent substantive distinction exists between texts and emails sent by EPA officials using devices provided by the agency.<sup>3</sup> Like emails, their transmission and content are of

---

<sup>2</sup> See September 18, 2013 letter from Eric E. Wachter, Director, EPA Office of the Executive Secretariat, to Christopher C. Horner, CEI, at 1 (“no records exist” responsive to request HQ-2013-009235 for “copies of all EPA-related text messages sent and/or received by Lisa P. Jackson on May 27, 2010”; EPA claims that “not all documents created by government employees are subject to preservation under the Federal Records Act. As with all electronic communication, EPA employees are required to determine whether text messages are record material and to preserve as appropriate. The text messages described in the example your provide certainly suggest unrecord material not subject to the Federal Records Act.”)

Under 44 U.S.C. § 3301 records include “all. . . machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency . . . as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of the data in them.”

EPA acknowledges on its website that “[t]he definition of a record under the Freedom of Information Act (FOIA) is broader than the definition under the Federal Records Act.” See, e.g., Environmental Protection Agency, *What Is a Federal Record?*, <http://www.epa.gov/records/tools/toolkits/procedures/part2.htm>.

<sup>3</sup> See *Frequent Questions about Mobile and Portable Devices, and Records*, [www.epa.gov/records/faqs/pda.htm](http://www.epa.gov/records/faqs/pda.htm) (“Common Agency records maintained on Mobile Devices include e-mail . . . and any other information related to your work at EPA. . . Records created on your Mobile Device should be transferred to your office's recordkeeping system on a regular basis. . . **Is the information on my Mobile Device subject to FOIA . . . ?** Yes, information on your Mobile Device may be requested under FOIA or in response to litigation. **My Mobile**

significant public interest, especially due to EPA's recurrent failure to produce text message transcripts in response to FOIA and congressional oversight requests for specified "records" and "electronic records" in particular.

- 8) EPA's practice of allowing employees to unilaterally and immediately destroy an the Agency's sole copies of an entire class of records is unlawful, regardless of what the medium of communication is. "While the agency undoubtedly does have some discretion to decide if a particular document satisfies the statutory definition of a record," the Federal Records Act does not "allow the agency by fiat to declare 'inappropriate for preservation' an entire set of" electronic or "email documents" generated by high-ranking officials like Gina McCarthy over a multi-year period.<sup>4</sup>
- 9) EPA has failed to preserve these documents despite previously being warned by the courts to stop deleting and destroying electronically-stored information and other documents. *See, e.g., Union Pac. R.R. Co. v. U.S. Envtl. Prot. Agency*, 2010 WL 2560455 (D. Neb. June 24, 2010) (granting temporary restraining order against EPA, enjoining the EPA from deleting or

---

**Device was not provided by the Agency. Do these rules still apply to me?** Yes, if you have Agency records on a personally-owned Mobile Device, they still need to be captured in an approved recordkeeping system.");

36 C.F.R. 1236.22 ("electronic mail records" covered; "Agencies that allow employees to send and receive official electronic mail messages using a system not operated by the agency must ensure that Federal records sent or received on such systems are preserved"); *see also, Armstrong v. Executive Office of the President*, 1 F.3d 1274, 1284, 1288 (D.C. Cir. 1993) ("electronic communications systems contain preservable records" covered by the Federal Records Act," and "do produce federal records"); *Id.* at 1288 ("agencies have an obligation . . . to undertake periodic [compliance] reviews to assure that" record preservation procedures "are being adhered to," requirements that "apply to all electronic systems used by agency employees to create electronic records, not just . . . to 'official' agency electronic records systems . . . defendant agencies must undertake some periodic review of their employees' electronic recordkeeping practices."); *Landmark Legal Foundation v. EPA*, 2013 WL 4083285, \*5 (D.D.C. Aug. 14, 2013) (denying EPA summary judgment in FOIA case where EPA did not search the individual "email accounts of the Administrator, the Deputy Administrator, or the Chief of Staff,"; noting "the possibility. . . that leaders in the EPA may have purposefully attempted to skirt disclosure under the FOIA.").

<sup>4</sup> *See Armstrong v. Executive Office of the President*, 1 F.3d 1274, 1283 (D.C. Cir. 1993).

destroying any potentially relevant electronically-stored information, and also ordering EPA to identify, collect, and preserve such information relevant to company's FOIA request as well as designate an expert on electronically-stored information to "insure the enforcement" of the temporary restraining order, in light of evidence that "the EPA has engaged in a practice of deleting relevant emails in response to Union Pacific's FOIA request"; eight emails indicated EPA official instructed employees to destroy documents and delete emails relevant to company's FOIA request).<sup>5</sup>

- 10) Plaintiff CEI states on information and belief that a senior Agency official cautioned Ms. McCarthy to cease sending text messages due to concerns about the propriety of the content of her texting about congressional oversight efforts specifically on days when she testified before either the House or Senate. This information prompted plaintiff's first request for text messages sent or received on those eighteen dates she appeared before one or the other body.
- 11) Since all of the text messages at issue were sent or received by the EPA's current administrator and her predecessor, these records and whether EPA fulfilled its obligation to maintain and to produce them are of significant public interest. This is especially true given that Ms. McCarthy, specifically, was the official charged with responsibility for ensuring that recordkeeping laws were complied with, and therefore presumably was aware of the propriety and implication of destroying the sole copies of her own correspondence.
- 12) Despite the above, and in the face of revelations about organized and systemic abuses by senior federal employees to hide from the public their activities, particularly their electronic

---

<sup>5</sup> See also *Landmark Legal Foundation v. E.P.A.* 2013 WL 4083285 (D.D.C. Aug. 14, 2013) (judge denied EPA summary judgment based on "the potential spoliation of records that should have been searched" (*id.* at \*8 n.7), and EPA's previous record of contempt in a related matter, *id.*, as well as the "possibility that EPA engaged in ... apparently bad faith interpretation" of a FOIA request. *Id.* at \*6). *Union Pacific R. Co. v. U.S. E.P.A.*, 2010 WL 3455240 (D. Neb. Aug. 26, 2010) (granting preliminary injunction against EPA).

communications,<sup>6</sup> EPA has failed to preserve these documents (as required by the Federal Records Act), much less to produce them in response to FOIA requests. EPA has failed to preserve these documents despite previously being warned by the courts to stop erasing and failing to preserve documents. Plaintiff asserts on information and belief that EPA has also failed to notify the National Archivist as required when it learns of such potential loss of records; as Ms. McCarthy was the responsible officer as well as the party destroying her own correspondence, EPA has been aware of this practice for several years but it also has been specifically otherwise informed by virtue of the FOIA proceedings cited, *supra*.

13) Accordingly, plaintiff files this lawsuit to compel EPA to comply with the law.

---

<sup>6</sup> See, e.g., Stephen Dinan, *EPA Officials Lied About Email Use, Senator Says*, Washington Times, March 11, 2013, at A4 (“Mr. Martin and Ms. Jackson both resigned last month, after Mr. Vitter and Rep. Darrell E. Issa, California Republican and chairman of the House oversight committee, began an investigation into the emails”); *U.S. Senator David Vitter Hearing Statement Summary: Nomination Hearing for Ms. Gina McCarthy to Lead U.S. Environmental Protection Agency Before the Senate Committee on Environment and Public Works*, U.S. Federal News, April 11, 2013 (“EPA Region 8 Administrator James Martin resigned after lying to a federal court, and after EPA lied that he was not using his private email account to conduct official business in violation of the Federal Records Act and the Freedom of Information Act”); Stephen Dinan, *Do Text Messages from Feds Belong on Record? EPA’s Chief’s Case Opens Legal Battle*, Washington Times, April 30, 2011, at A1 (discussing how CEI’s Christopher Horner “exposed former EPA chief Lisa P. Jackson’s private email account” and those of other EPA officials; and how “several congressional committees looking into the EPA also discovered other agency officials using personal emails to conduct government business - a violation of the Freedom of Information Act”; “The EPA’s internal auditor also is looking into how well the agency is complying with the law.”); Dinan, *EPA Staff to Retrain on Open Records; Memo Suggests Breach of Policy*, Wash. Times, Apr. 9, 2013, at A4 (“The Environmental Protection Agency . . . acknowledged that it needs to do better at storing instant-message communications, after the agency came under severe fire from members of Congress who say it appears to have broken those [open-government] laws” in an apparent “admission that the agency has fallen short on its obligations.”); Dinan, *Suit Says EPA Balks at Release of Records; Seeks Evidence of Hidden Messages*, Wash. Times, Apr. 2, 2013, at A1 (“EPA officials were using private email addresses to conduct official business”; “James Martin, who at the time was administrator of EPA’s Region 8, used his personal email account to collaborate with the Environmental Defense Fund about where hearings on agency greenhouse gas rules could be held for maximum effect.”).

### **PARTIES**

- 14) Plaintiff CEI is a public policy research and educational institute in Washington, D.C., dedicated to advancing responsible regulation and in particular economically sustainable environmental policy. CEI's programs include research, investigative journalism and publication, as well as a transparency initiative seeking public records relating to environmental policy and how policymakers use public resources. CEI regularly files, and will continue to file, FOIA requests with EPA, as part of this initiative, as is illustrated by a number of such cases on this Court's docket.<sup>7</sup>
- 15) Defendant EPA is a federal agency headquartered in Washington, D.C..

### **JURISDICTION AND VENUE**

- 16) This Court has jurisdiction pursuant to 5 U.S.C. § 552(a)(4)(B), because this action is brought in the District of Columbia, and 28 U.S.C. § 1331, because the resolution of disputes under FOIA presents a federal question (as do resolution of disputes under the Federal Records Act; the Administrative Procedure Act; and the Mandamus Act, all of which are applicable in this case. This court also has jurisdiction of the mandamus claim pursuant to 28 U.S.C. § 1361).
- 17) Venue is proper under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e) because plaintiff resides in the District of Columbia, and defendant EPA is a federal agency.

### **FURTHER FACTUAL BACKGROUND**

- 18) EPA has not provided any records in response to CEI's FOIA request for former Assistant Administrator (and current EPA Administrator) McCarthy's text messages or former Administrator Jackson's text messages.

---

<sup>7</sup> See, e.g., *Competitive Enterprise Institute v. Environmental Protection Agency*, D.D.C. civil actions ## 12-1497, 12-1617, 13-406, 13-434, 13-624, 13-779, 13-1074 (all involving FOIA requests to EPA by plaintiff).

- 19) EPA has also not provided any text messages in response to congressional requests for certain described “all records” or “all electronic records”, involving any employee.
- 20) EPA has also not provided any text messages in response to FOIA requests by others for certain described “all records” or “all electronic records”, involving any employee.
- 21) This is despite the fact that transparency in government is the subject of high-profile vows by the president and attorney general that FOIA will “be administered with a clear presumption: In the face of doubt, openness prevails” (*See* Attorney General Eric Holder, *OIP Guidance, President Obama’s FOIA Memorandum and Attorney General Holder’s FOIA Guidelines, Creating a “New Era of Open Government”*, <http://www.justice.gov/oip/foiapost/2009foiapost8.htm>; *Memorandum for the Heads of Executive Departments*, [www.whitehouse.gov/the\\_press\\_office/Freedom\\_of\\_Information\\_Act](http://www.whitehouse.gov/the_press_office/Freedom_of_Information_Act).)

**Plaintiff CEI's FOIA Request for Certain Specified  
Text Messages of Gina McCarthy (EPA-HQ-2013-006005)**

- 22) On April 26, 2013, CEI submitted a FOIA Request by electronic mail, seeking:
- copies of all text messages sent by Assistant Administrator for Air and Radiation Gina McCarthy on a mobile telephone provided for her use by the Agency, on the following eighteen days:
- 2009: July 9, 2009; July 14, 2009
- 2010: July 22, 2010; March 4, 2010; March 24, 2010
- 2011: March 1, 2011; March 13, 2011; March 24, 2011; April 13, 2011; May 13, 2011; June 30, 2011; September 8, 2011; September 15, 2011; October 12, 2011; October 25, 2011
- 2012: February 28, 2012; June 19, 2012; June 29, 2012.

**Defendant’s Response to Plaintiff’s FOIA Request**

- 23) EPA assigned this request identification number EPA-HQ-2013-006005 by letter dated and sent by email on May 9, 2013.

- 24) Defendant EPA's only response was to acknowledge receipt of the request, say it would respond to the request at some unspecified future time, and inform CEI that its request was "non-billable" under FOIA.<sup>8</sup> (Typically, FOIA requests are non-billable when they can be handled in two hours or less. *See* 5 U.S.C. § 552(a)(4)(A)(iv)). This does not constitute the required substantive response.<sup>9</sup>
- 25) In light of EPA's failure to provide any substantive response within the 20-day deadline for responding to FOIA requests, CEI, having exhausted its administrative remedies, sued EPA for its non-compliance with FOIA on May 29, 2013.<sup>10</sup>
- 26) After CEI sued, EPA provided plaintiff with a "no records" response. EPA stated that it has been unable to locate any such texts in response to plaintiff's FOIA request.<sup>11</sup> It did so even though Ms. McCarthy sent or received many thousands of such text messages over the covered period, as plaintiff subsequently learned, such that on the basis of information later

---

<sup>8</sup> *See* May 9, 2013 letter from National FOIA Officer Larry Gottesman to CEI counsel Christopher Horner.

<sup>9</sup> *See CREW v. FEC*, 711 F.3d 180, 186 (D.C. Cir. 2013) ("CREW") (administrative remedies are deemed exhausted unless, within the 20-day period, agency has at least informed the requesting party of the scope of potentially responsive records, including the scope of the records it plans to produce and withhold under any FOIA exemptions).

<sup>10</sup> *See Complaint in Competitive Enterprise Institute v. United States Environmental Protection Agency*, D.D.C. Civil Action No. 13-779; *Answer* ¶¶36 (not denying plaintiff had exhausted its administrative remedies), ¶¶ 25-27 (not denying the specific facts showing exhaustion).

<sup>11</sup> *See, e.g., Answer in Competitive Enterprise Institute v. Environmental Protection Agency*, D.D.C. No. 13-779 (filed 7/19/2013) at ¶ 8 (conceding that such texts were sent by EPA Assistant Administrator Gina McCarthy), ¶21 (conceding that EPA provides such officials "with personal digital assistants that have text messaging capability"), ¶¶14, 33 (EPA currently unable to locate such records); Email from Michelle Lo, counsel for EPA, to Chris Horner and Hans Bader, counsel for CEI, at 9/9/2013 3:46 PM (admitting that "Ms. McCarthy uses text messaging," but arguing that "they were not required to be preserved by the Agency."); Email from Michelle Lo, counsel for EPA, to Chris Horner and Hans Bader, counsel for CEI, at 8/1/2013 7:25 PM (conceding that "Ms. McCarthy used the texting function on her EPA phone," and that "none of her texts over the period encompassing the 18 specific dates at issue in CEI's FOIA request (July 9, 2009, to June 29, 2012) were preserved").



obtained,<sup>12</sup> the statistical probability that Ms. McCarthy did not text on any of those eighteen dates is virtually zero.<sup>13</sup> Plaintiff subsequently learned that EPA did not preserve text messages from those eighteen dates or otherwise.<sup>14</sup> CEI dismissed that suit without prejudice in light of the claim that no responsive documents remained. *See Stipulation of Dismissal*, 9/13/2013 (docket #8). CEI later obtained the information showing that in fact EPA was not preserving, and instead was destroying, all such correspondence.

**Plaintiff CEI's FOIA Request for Certain Specified Text  
Text Messages of Lisa P. Jackson (EPA-HQ-2013-009235)**

- 27) On August 19, 2013, plaintiff submitted a FOIA request seeking “copies of all EPA-related text messages sent and/or received by Lisa P. Jackson on May 27, 2010.”
- 28) This FOIA request, submitted to EPA by email to [hq.foia@epa.gov](mailto:hq.foia@epa.gov), sought to obtain the text messages in which former EPA Administrator Lisa Jackson reportedly discussed business opportunities sought by a “cotton absorbent company” whose CEO the email described her as meeting at a “Climate Rally.”<sup>15</sup> These text messages, as described in Jackson’s own email

---

<sup>12</sup> See document sent by EPA to plaintiff’s counsel attached to July 26, 2013 email to Chris Horner, with PDF file bearing the title “202-596-0247 - Text bill - Jul 09-June 12.pdf,” produced in response to FOIA Request HQ-2013-006937, which sought certain text-related phone bills and invoices. That document provided certain metadata showing 5,392 text messages sent or received by Ms. McCarthy during billing periods from July 2009 to July 2012.

<sup>13</sup> See document sent by EPA to plaintiff’s counsel attached to Aug. 20 Horner email, with PDF file bearing the title “202-596-0247 - Text bill - Jul 09-June 12.pdf,” produced in response to FOIA Request HQ-2013-006937 (submitted, June 3, 2013). CEI staff estimated the odds of this actually occurring as one in 7.9 sextillion. See <http://cei.org/news-releases/odds-epa-not-destroying-gina-mccarthy-text-messages-1-79-sextillion> (calculation available at [www.scribd.com/doc/157256436/McCarthy-Texting-Probability](http://www.scribd.com/doc/157256436/McCarthy-Texting-Probability))

<sup>14</sup> See, e.g., email from Michelle Lo, FN 11, *supra*.

<sup>15</sup> See Email from EPA Administrator Lisa Jackson using her EPA “Richard Windsor” account to Aaron Dickerson, 6/4/2010 3:36 PM, enclosing email from Michael Martin to Aaron Dickerson, May 27, 2010, at 18:43:30 (“Administrator Jackson and I had txt’d this am about” a green-jobs opportunity for a “cotton absorbent company” Jackson had met at “the Climate Rally”). This email can be found in *Freedom of Information Act Request HQ-FOI-01268-12*, Fourth Release (04/15/13), Part C, on the 22<sup>nd</sup> of 508 pages in that document, which is currently available at [www.epa.gov/epafoia1/docs/Release-4-Part-C.pdf](http://www.epa.gov/epafoia1/docs/Release-4-Part-C.pdf) (visited 10/2/ 2013). It is one of the releases

thread, occurred in the context of EPA's involvement in the clean-up efforts surrounding the Deepwater Horizon drilling platform explosion and oil leak in the Gulf of Mexico, and the company in question sought to promote its purportedly environmentally-friendly products to the EPA for use in conjunction with the cleanup.

**Defendant's Response to Plaintiff's FOIA Request**

- 29) EPA assigned this request identification number EPA-HQ-2013-009235.
- 30) Although the text messages' occurrence was memorialized in Administrator Jackson's own email addressing the subject,<sup>16</sup> an email that EPA produced as being work-related, on September 18, 2013, EPA issued a "no-records" response, reflecting the correspondence's destruction by EPA.
- 31) EPA indicated that the messages had not been preserved, despite their obvious relation to EPA's work like the email referencing them, and despite their being addressed to Jackson in her capacity as "Administrator Jackson," on the grounds that such communications are "unrecord material not subject to the Federal Records Act," and so EPA destroys them.<sup>17</sup> It appears that this destruction is performed by the individual employees destroying the Agency's sole copy of the correspondence.
- 32) In that September 18, 2013 "no records" letter, Eric E. Wachter, the Director of EPA's Office of the Executive Secretariat, did not deny that Jackson exchanged such messages, but excused EPA's failure to produce them with the assertion that "not all documents created by government employees are subject to preservation under the Federal Records Act. As with

---

of documents in response to a FOIA request that is currently found on EPA's *Frequently Requested Records* page, available at [www.epa.gov/epafoia1/frequent.html](http://www.epa.gov/epafoia1/frequent.html).

<sup>16</sup> See footnote 15 above.

<sup>17</sup> See September 18, 2013 letter from Eric E. Wachter, Director, EPA Office of the Executive Secretariat, to Christopher C. Horner, at 1 ("no records exist" responsive to request HQ-2013-009235 for "copies of all EPA-related text messages sent and/or received by Lisa P. Jackson on May 27, 2010" for this reason).

all electronic communication, EPA employees are required to determine whether text messages are record material and to preserve as appropriate. The text messages described in the example you provide certainly suggest unrecord material not subject to the Federal Records Act.”

- 33) Wachter did not explain what constitutes “unrecord material,” or why he used this peculiar phrase defined nowhere in any statute, regulation, or dictionary. Assuming that “unrecord material” means documents not covered by federal records laws, he did not explain how EPA-related communications could possibly *not* be subject to such laws (like the Federal Records Act and FOIA, which has the broadest definition of record among relevant laws), for example when addressed to senior EPA officials like Jackson in their official capacity; are exchanged with such officials using EPA-supplied devices for creating and transmitting records; and address a subject whose discussion, in email form, was preserved and produced under FOIA as an agency “record.” He also did not address the obvious question he begged of how an entire class of records, which he acknowledges in theory can be records, is being destroyed because in practice all are “unrecord material”.
- 34) Mr. Wachter was acting as a high-ranking agency official in charge of EPA FOIA and record-keeping policies and practices when asserting this position that a class of records which, when the substantively same correspondence is transmitted via a legally equivalent medium (email), are in great part being preserved but are not preserved and instead are destroyed when transmitted by the alternative to email EPA provides, text messaging, as “unrecord material”. Wachter heads the office that is in charge of “processing Freedom of Information (‘FOIA’) requests for the Office of the Administrator; maintaining the records of the Administrator and Deputy Administrator; managing the Administrator’s and Deputy

Administrator's executive correspondence; and administering the EPA's electronic correspondence tracking system.”<sup>18</sup> Moreover, the policy and/or practice of document destruction and failure to preserve documents directly involves high-ranking EPA officials, such as its current and former Administrator, who are specifically assigned responsibility for agency policy but who are destroying their own sole Agency copy of an entire class of correspondence.

- 35) In another FOIA case before this Court concluded earlier this year, seeking EPA-related emails on the non-official email account of then-Region 8 Administrator James Martin, EPA similarly asserted that such correspondence were not Agency records,<sup>19</sup> only to eventually abandon that position.
- 36) In the *Landmark* case cited, *supra*, another judge of this Court concluded that Mr. Wachter's declaration was seriously lacking in credibility. *See Landmark Legal Foundation v. E.P.A.* 2013 WL 4083285, \*6 (D.D.C. Aug. 14, 2013). In that case, Judge Lamberth repeatedly found that central claims made by Mr. Wachter were “inconsistent” (*id.* at \*\*1-2 & fn. 3) and “vague” (*id.* at \*3) and that Mr. Wachter's evasive “silence speaks volumes” (*id.* at 5).

### **LEGAL ARGUMENTS**

#### **Text Messages are “Agency Records” Under Federal Record-Keeping and Disclosure Laws, and Under EPA's Implementing Policies**

- 37) EPA provides certain employees with PDAs and text messaging capability as an alternative to email for official or otherwise work-related internal or external communications.
- 38) Text messaging correspondence may be Agency records, are subject to FOIA, and must be maintained and produced as such, under the Federal Records Act and FOIA. *See, e.g.,*

---

<sup>18</sup> *See Search Declaration of Eric E. Wachter*, at ¶2, in *CEI v. EPA*, No. 12-1617 (D.D.C. filed, 8/21/2013) (docket doc. # 24-4).

<sup>19</sup> *See CEI v. EPA*, D.D.C. Civil Action No. 12-1497 (ESH), *Memorandum of Points and Authorities In Support of Defendant's Motion for Summary Judgment* at 4-5.

National Archives, *Frequently Asked Questions About Instant Messaging*,

<http://www.archives.gov/records-mgmt/initiatives/im-faq.html> (Instant Messaging (IM)

content can “qualify as a Federal Record,” since IM “allows users” to “exchange text messages,” which are “machine readable materials” and thus within the “statutory definition of records”); *Frequent Questions about E-Mail and Records*,

<http://www.epa.gov/records/faqs/email.htm>; *Frequent Questions about Mobile and Portable Devices, and Records*, [www.epa.gov/records/faqs/pda.htm](http://www.epa.gov/records/faqs/pda.htm); *Memo to All Staff*,

“*Transparency at EPA*,” by Acting Administrator Bob Perciasepe, dated April 8, 2013 (“the Inspector General currently is conducting an audit of the agency’s records management practices and procedures. We have suggested they place focus on electronic records including email and instant messaging. While we have made progress in these areas, we are committed to addressing any concerns or weaknesses that are identified in this audit . . . to strengthen our records management system”).<sup>20</sup>

- 39) Former EPA Administrator Jackson and current EPA Administrator McCarthy had a duty under the Federal Records Act (FRA) not to destroy text messages, and to take remedial action once such destruction occurred. For example, under the FRA, each agency head

shall notify the Archivist [the head of the National Archives and Records Administration] of any actual, impending, or threatened unlawful removal, defacing, alteration, or destruction of records in the custody of the agency of which he is the head that shall come to his attention, and with the assistance of the Archivist shall initiate action through the Attorney General for the recovery of records he knows or has reason to believe have

---

<sup>20</sup> See also April 11, 2008 memorandum from John B. Ellis, EPA, to Paul Wester, National Archives and Records Administration, at 4 (reporting discovery of record-keeping problems), available at [http://www.epw.senate.gov/public/files/2008\\_EPA\\_Archives\\_Memo\\_HILITED.pdf](http://www.epw.senate.gov/public/files/2008_EPA_Archives_Memo_HILITED.pdf); *Records and ECMS Briefing, EPA Incoming Political Appointees 2009*, [http://www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore\\_id=60afa4b3-3e5d-4e6f-b81e-64998f0d3c67](http://www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=60afa4b3-3e5d-4e6f-b81e-64998f0d3c67).

been unlawfully removed from his agency, or from another Federal agency whose records have been transferred to his legal custody.<sup>21</sup>

EPA has responded to such information by informing the Archivist, in the past, when learning of similar destruction of emails.<sup>22</sup>

40) However, neither Jackson nor McCarthy has taken any such action, despite having the duty to do so in their capacity as head of the agency (indeed, according to EPA they are the officials who destroyed their own correspondence). Nor has the Archivist ever been notified of the destruction or loss of the records. Nor has EPA taken other remedial actions, as is required to comply with its duty under the FRA to “establish safeguards against the removal or loss of records he determines to be necessary and required by regulations of the Archivist”<sup>23</sup> and “make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency....”<sup>24</sup>

### **FIRST CLAIM FOR RELIEF**

#### **Duty to Preserve and Not Destroy Text Messages -- Declaratory Judgment**

41) Plaintiff re-alleges paragraphs 1-40 as if fully set out herein.

42) EPA’s pattern, practice, and ongoing policy of destroying, and not preserving, and/or allowing the employee-correspondent to unilaterally destroy the Agency’s sole copy of a class of records (text messages sent and received on EPA-supplied devices, including work-related or possibly work-related correspondence) violates the Federal Records Act and illegally denies the public access to records covered by the Freedom of Information Act.<sup>25</sup> It

---

<sup>21</sup> 44 U.S.C. § 3106.

<sup>22</sup> See April 11, 2008 “Ellis” memo, FN 20, *supra*, at 1-3.

<sup>23</sup> Id. § 3105.

<sup>24</sup> 44 U.S.C. § 3101.

<sup>25</sup> See, e.g., *Payne Enters., Inc. v. United States*, 837 F.2d 486, 491 (D.C.Cir.1988) (separate from claims seeking relief for specific FOIA requests, requesting parties may also assert a “claim

is also arbitrary and capricious agency action that violates the Administrative Procedure Act (APA), 5 U.S.C. § 704, et seq.<sup>26</sup>

- 43) Plaintiff CEI regularly files FOIA requests with EPA seeking agency records, as the docket of this District illustrates.<sup>27</sup> CEI has filed, and will continue to file, such FOIA requests seeking emails, text messages, and instant messages from EPA regarding high-ranking EPA officials, including those encompassed by the Office of the Administrator and the Assistant Administrator for the Office of Air and Radiation. This is part of CEI's ongoing transparency initiative seeking public records relating to environmental policy and how policymakers use public resources.
- 44) Plaintiff has sought and been denied production of responsive records reflecting the conduct of official business.
- 45) Plaintiff has a statutory right to the information it seeks.
- 46) Defendant has acknowledged, directly and through counsel, destroying these correspondence.
- 47) Moreover, federal regulations mandate that "Records shall not be disposed of while they are the subject of a pending . . . lawsuit under the FOIA" such as this one (or plaintiff's previously-filed FOIA lawsuits seeking electronic records).<sup>28</sup>

---

that an agency policy or practice will impair the party's lawful access to information in the future"); *Hajro v. U.S. C.I.S.*, 832 F.Supp.2d 1095 (N.D. Cal. 2012) (attorneys could bring lawsuit challenging pattern or practice of agency delays in responding to Freedom of Information Act requests submitted on behalf of their client).

<sup>26</sup> See, e.g., *CREW v. Executive Office of the President*, 587 F.Supp.2d 48 (D.D.C. 2008) (rejecting motion to dismiss claims over agency's allegedly illegal destruction and failure to preserve emails under the APA, 5 U.S.C. §§ 704-06, and the Mandamus Act, 28 U.S.C. § 1361).

<sup>27</sup> See, e.g., *Competitive Enterprise Institute v. Environmental Protection Agency*, D.D.C. civil actions ## 12-1497, 12-1617, 13-406, 13-434, 13-624, 13-779, 13-1074 (all involving FOIA requests to EPA by plaintiff).

<sup>28</sup> 40 C.F.R. § 2.106.

- 48) Regardless, plaintiff states on information and belief that EPA continues this pattern, practice and/or policy described herein.
- 49) Further, it is a violation of the U.S. Code to willfully and unlawfully conceal, remove, mutilate, obliterate, or destroy any record, proceeding, paper, document, or other thing, filed or deposited with any clerk or officer of any court of the United States, or in any public office, or with any public officer of the United States, or attempt or act with intent to do so.<sup>29</sup>
- 50) As a regular FOIA requester, CEI will continue to experience ongoing harm in the form of lost information and destruction of the documents it seeks unless this court declares EPA's policy of not preserving text messages illegal and puts an end to it.
- 51) EPA has not disavowed or repudiated its position justifying the destruction of such agency documents. EPA has instead defended the practice as appropriate, and efforts to compel the Agency to cease the practice as intrusive. It clearly intends to apply this objectionable position in future FOIA requests by plaintiff. It is therefore evident that the impermissible practice is a continuing one, that plaintiff will experience a continuing injury due to this practice, and that no relief is forthcoming.<sup>30</sup>
- 52) "The case is fit for review because it presents a clear-cut legal question," whether EPA's document preservation policy regarding text messages is "inconsistent" with federal record management laws such as the Federal Records Act and FOIA.<sup>31</sup>
- 53) This Court should issue a declaratory judgment that EPA has violated its duty to preserve records under the Federal Records Act and FOIA; has acted arbitrarily, capriciously, and illegally in violation of the APA; and that it has a duty to preserve, and prevent the destruction by EPA employees, of text messages transmitted on EPA devices.

---

<sup>29</sup> 18 USC § 2071 - Concealment, removal, or mutilation generally.

<sup>30</sup> See *Better Gov't Ass'n v. Dept. of State*, 780 F.2d 86, 90-92 (D.C. Cir. 1992).

<sup>31</sup> See *Venetian Casino Resort LLC v. EEOC*, 409 F.3d 359, 365 (D.C. Cir. 2005).



54) EPA should also be required to disclose how it came to design and implement a system whereby absolutely no record of this class of correspondence is preserved. EPA has failed to preserve not only the text messages, but also all metadata about them. For example, according to EPA, it is aware that its arrangement with its telephone carrier no longer preserves the telephone numbers to which text messages were sent or from where they were received.<sup>32</sup> This makes it impossible to cross-check an official's, *e.g.*, McCarthy's, claims that each and every among the thousands of text messages on her EPA phone were all personal and not one was work-related. EPA should also be required to reveal just how this system of record destruction operates, and who was responsible for putting it in place.

### **SECOND CLAIM FOR RELIEF**

#### **Duty to Preserve and Not Destroy Text Messages – Injunctive Relief**

55) Plaintiff re-alleges paragraphs 1-54 as if fully set out herein

56) EPA will continue its unlawful policy of destroying and not preserving text messages unless it is enjoined from so doing, even though that policy violates the Federal Records Act, destroys documents subject to FOIA, and is arbitrary and capricious agency action violative of the Administrative Procedure Act. "In utilizing its equitable powers to enforce the provisions of the FOIA, the district court may consider injunctive relief where appropriate ...

---

<sup>32</sup> See Email from DoJ counsel for EPA Mark Nebeker to Chris Horner, counsel for CEI, copying Cindy Anderson of EPA OGC, at 9/12/2013 1:54 PM (admitting that "Although phone calls are delineated by each number called and the airtime and charges, that is not true for text messages. It is my understanding the Agency does not receive a record from Verizon (or, in this case, its predecessor, AT&T) of individual text messages made by its employees, including Ms. McCarthy. ") This involved FOIA request HQ-2013-006937 and *Competitive Enterprise Institute v. Environmental Protection Agency*, D.D.C. Civil Action No. 13-1074, seeking McCarthy's text-message metadata information from phone bills, which is also being destroyed. In a subsequent email Ms. Anderson asserted that with AT&T, a very limited amount of metadata had been preserved, from April 2011 to November 2011. See Email from Cindy Anderson of EPA to Chris Horner, September 17, 2013 9:17 AM.

to bar future violations that are likely to occur.”<sup>33</sup> Courts have previously found that injunctive relief is necessary to prevent EPA from deleting or destroying documents subject to FOIA.<sup>34</sup>

- 57) Thus, CEI is entitled to injunctive relief forbidding EPA to destroy and/or not preserve text messages.
- 58) In addition, CEI is entitled to preliminary injunctive relief forbidding such practices, because the destruction and failure to preserve documents results in irreparable harm by forever eliminating access to those documents, and because there is a strong public interest in ensuring an agency’s compliance with federal record management laws such as the Federal Records Act and FOIA,<sup>35</sup> and with regulations commanding that records not “be disposed of while they are the subject of a pending . . . lawsuit under the FOIA.”<sup>36</sup>
- 59) This Court should enter an injunction ordering EPA to preserve, and prevent the destruction by EPA employees, of text messages transmitted on EPA devices; and to establish safeguards against their removal and loss.

---

<sup>33</sup> See *Long v. United States Internal Revenue Service*, 693 F.2d 907, 909 (9th Cir.1982).

<sup>34</sup> See, e.g., *Union Pac. R.R. Co. v. U.S. Env’tl. Prot. Agency*, 2010 WL 2560455 (D. Neb. June 24, 2010) (granting temporary restraining order in light of evidence that “the EPA has engaged in a practice of deleting relevant emails in response to Union Pacific’s FOIA request”; emails indicated EPA official instructed employees to destroy documents and delete emails relevant to company’s FOIA request); *Union Pac. R.R. Co. v. EPA*, 2010 WL 3455240 (D. Neb. Aug. 26, 2010) (granting preliminary injunction against EPA).

<sup>35</sup> See *EPIC v. Department of Justice*, 416 F.Supp.2d 30, 40-42 (D.D.C. 2006) (granting preliminary injunction to expedite response to FOIA request, because even delay in producing documents is irreparable harm; and noting that there is a strong public interest in enforcing compliance with federal laws such as FOIA) (“there is an overriding public interest ... in the general importance of an agency’s faithful adherence to its statutory mandate.”), quoting *Jacksonville Port Auth. v. Adams.*, 556 F.2d 52, 59 (D.C.Cir.1977); *Union Pac. R.R. Co. v. U.S. Env’tl. Prot. Agency*, 2010 WL 2560455 (D. Neb. June 24, 2010) (granting temporary restraining order against EPA, enjoining the EPA and its employees from deleting or destroying emails in violation of FOIA, and finding “irreparable harm” from EPA’s “pattern of deleting relevant emails”).

<sup>36</sup> 40 C.F.R. § 2.106.

### **THIRD CLAIM FOR RELIEF**

#### **Duty to Preserve and Not Destroy Text Messages – Writ of Mandamus**

- 60) Plaintiff re-alleges paragraphs 1-59 as if fully set out herein.
- 61) Plaintiff has a clear right to relief under laws such as the Federal Records Act; the defendant has a clear duty to act; and there is no other adequate remedy available to plaintiff.
- 62) CEI has a clear statutory right to the records that it seeks, EPA has not fulfilled its clear statutory obligations to preserve and provide such records, and there is no legal basis for destroying them.
- 63) Thus, this destruction of documents justifies the grant of a writ of mandamus or other extraordinary relief, and gives rise to a remedy under the Mandamus Act, 28 U.S.C. 1361.<sup>37</sup> Accordingly, this court should issue a writ of mandamus.

### **FOURTH CLAIM FOR RELIEF**

#### **Duty to Notify the Archivist of the United States - Injunctive Relief**

- 64) Plaintiff re-alleges paragraphs 1-63 as if fully set out herein.
- 65) The deletion by the EPA Administrator and Assistant Administrator of all text messages, including texts that were substantively similar to emails that were preserved and produced as records under FOIA, caused the destruction of federal records.
- 66) The head of any Federal agency has an obligation to notify the Archivist of the United States whenever “any actual, impending, or threatened unlawful removal, defacing, alteration, or destruction of records in the custody of the agency of which he is the head come[s] to his attention”,<sup>38</sup>

---

<sup>37</sup> See *CREW v. Executive Office of the President*, 587 F.Supp.2d 48 (D.D.C. 2008) (agency’s destruction of numerous emails gave rise to mandamus claim).

<sup>38</sup> 44 U.S.C.A. § 3106

- 67) The Administrator of the EPA had actual knowledge of the destruction of the federal records in the form of text messages, since the previous and current Administrator both directed and carried out the deletion of those records.
- 68) The knowledge on the part of the Administrator triggered the obligation under 44 U.S.C.A. § 3106 to notify the Archivist of the United States and the Attorney General, in order to recover those records destroyed.
- 69) Neither Administrator McCarthy nor Administrator Jackson ever notified the Archivist or the Attorney General regarding the destruction of the federal records.
- 70) The failure by the Administrator to take remedial action and to notify the Archivist or the Attorney General of the destruction of the documents despite clear statutory mandates is actionable under the APA.<sup>39</sup>
- 71) When the Administrator of a Federal agency fails to take action in compliance with the obligation of 44 U.S.C.A. § 3106, plaintiff has a right to seek to compel such compliance.<sup>40</sup>
- 72) Thus this Court should order the Administrator of the EPA to notify the Archivist of the United States, and the Attorney General about the destruction of federal records carried out by the Administrator and to assist the Attorney General in initiating an enforcement action.

**FIFTH CLAIM FOR RELIEF**  
**Costs And Fees – Injunctive Relief**

- 73) Plaintiff re-alleges paragraphs 1-72 as if fully set out herein.

---

<sup>39</sup> See *Armstrong v. Bush*, 924 F.2d 282, 295 (D.C. Cir. 1991) (“the FRA *requires* the agency head and Archivist to take enforcement action” in response to destruction of records; “On the basis of such clear statutory language mandating that the agency head and Archivist seek redress for the unlawful removal or destruction of records, we hold that the agency head's and Archivist's enforcement actions are subject to judicial review.”).

<sup>40</sup> See *Id.*

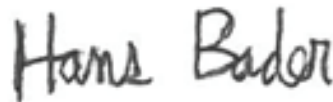
- 74) Pursuant to 5 U.S.C. § 552(a)(4)(E), the Court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.
- 75) Pursuant to 28 U.S.C. § 2412, this Court may award fees against the United States where its position was not substantially justified. Here, EPA's position contradicts federal record-keeping and other laws, and is not substantially justified.
- 76) This Court should enter an injunction ordering the defendant to pay reasonable attorney fees and other litigation costs reasonably incurred in this case.

WHEREFORE, Plaintiff requests the declaratory and injunctive relief herein sought, and an award for its attorney fees and costs and such other and further relief as the Court shall deem proper.

Respectfully submitted this 10th day of February, 2014,



Christopher C. Horner  
D.C. Bar No. 440107  
1899 L Street, NW, 12<sup>th</sup> Floor  
Washington, D.C. 20036  
(202) 262-4458  
[chris.horner@cei.org](mailto:chris.horner@cei.org)



Hans Bader, D.C. Bar No. 466545  
Sam Kazman, D.C. Bar No. 946376  
Competitive Enterprise Institute  
1899 L St., N.W., 12<sup>th</sup> Floor  
Washington, D.C. 20036  
(202) 331-2278, [hbader@cei.org](mailto:hbader@cei.org)  
Attorneys for Plaintiff

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

COMPETITIVE ENTERPRISE INSTITUTE	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 13-1532 (RMC)
	)	
UNITED STATES ENVIRONMENTAL	)	
PROTECTION AGENCY	)	
	)	
Defendant	)	
	)	

**PLAINTIFF’S MOTION FOR LEAVE TO FILE AMENDED COMPLAINT**

Pursuant to Federal Rule of Civil Procedure 15(a)(2), Plaintiff, the Competitive Enterprise Institute, hereby moves the Court for leave to amend its complaint. Plaintiff seeks to amend its complaint in order to better clarify the relief sought. Under the Federal Rules, leave to amend is liberally granted, especially for a modest amendment of this nature. *See Foman v. Davis*, 371 U.S. 178, 181-82 (1962) (reversing the denial of a motion to amend the complaint filed a day after dismissal of the complaint for failure to state a claim, where the plaintiff sought leave to amend the complaint to “state an alternative theory for recovery”).

Here, plaintiff seeks to amend the complaint to add a separate claim on pp. 20-21 seeking injunctive relief with regard to EPA’s duty to notify the Archivist of the United States about violations of the Federal Records Act. This is largely an amplification of what’s already in the original complaint, rather than something fundamentally new.<sup>1</sup> (The proposed amended

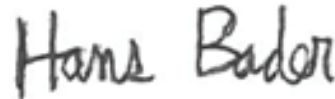
---

<sup>1</sup> The Complaint already seeks this sort of relief, although not in a separate count or claim for relief. For example, it requests that “This Court . . . enter an injunction ordering EPA . . . to notify the head of the National Archives and Records Administration of any destruction, removal, or loss of such records.” See ECF No. 1 at ¶¶ 56. And it alleges a destruction of records, and failure by EPA’s head, to notify the Archivist as required by the FRA, stating that EPA’s current and past Administrators were personally responsible for, and failed to take remedial action in

complaint accompanies this motion). Plaintiff nonetheless seeks leave to amend, in an abundance of caution, to make the Complaint clearer. (Defendant professes to find the original Complaint “dense and meandering,” with “unspecified claims.” This amendment should help make things clearer and easier to understand for the Defendant.)

Here, the amendment would not prejudice any party, especially given the early stage of this case; very few additional factual allegations are added; whatever new material there is arises from the same nucleus of operative facts alleged in the original complaint; and there should be no need for additional discovery, which has not even commenced (there is not likely to be much discovery in any event).<sup>2</sup> Plaintiff has conferred with counsel for Defendant, who has advised Plaintiff that Defendant does not consent to this motion.

Respectfully submitted this 10th day of February, 2014,



Hans Bader, D.C. Bar No. 466545  
Competitive Enterprise Institute  
1899 L St., N.W., 12<sup>th</sup> Floor  
Washington, D.C. 20036  
(202) 331-2278, [hbader@cei.org](mailto:hbader@cei.org)  
Attorneys for Plaintiff

---

response to, this destruction of records, see ECF No. 1 at ¶¶ 2-5, 24-26, 28-29. It alleges that although EPA Administrators have “a duty under the Federal Records Act (FRA) not to destroy text messages,” and to “notify the Archivist [the head of the National Archives and Records Administration]” of such destruction, *id.* at ¶37, the Archivist has “[n]ever been notified of the destruction or loss of the records” as mandated by the statute. *Id.* at ¶38. “EPA’s pattern, practice, and ongoing policy of destroying, and not preserving, a class of records (text messages sent and received on EPA-supplied devices) violates the Federal Records Act . . . EPA’s failure to take remedial action and to notify the Archivist of the loss of the documents despite clear statutory mandates also is actionable under the APA.” See ECF No. 1 at ¶ 40.

<sup>2</sup> See *State Teachers Retirement Bd. v. Fluor Corp.*, 654 F.2d 843, 856 (2d Cir.1981) (reversing district court’s denial of leave to amend where the new claim was closely related and there would be no need for “a great deal of additional discovery”); *Alley v. RTC*, 984 F.2d 1201, 1208 (D.C. Cir. 1993) (remanding to allow amendment where plaintiffs assured the court of appeals that there would be no need for additional discovery).

**CERTIFICATE OF SERVICE**

I hereby certify that on February 10, 2014, a copy of the foregoing Motion to Seek Leave to Amend was filed electronically. Notice of this filing will be sent by email to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

I also served the Proposed Amended Complaint by the same means, and also today served Plaintiff's Memorandum In Opposition to Defendant's Motion to Dismiss electronically as well, using the Court's CM/ECF System.

/s/ Hans Bader

*Hans Bader*



**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

COMPETITIVE ENTERPRISE INSTITUTE )

Plaintiff, )

v. )

Civil Action No. 13-1532 (RMC)

UNITED STATES ENVIRONMENTAL )  
PROTECTION AGENCY )

Defendant. )

**[PROPOSED] ORDER**

Upon consideration of Defendant's motion to dismiss, the plaintiff's opposition thereto, and any reply thereto, it is hereby ORDERED that Defendant's Rule 12(b)(6) motion to dismiss for failure to state a claim is DENIED.

Dated: \_\_\_\_\_

\_\_\_\_\_  
The Honorable Rosemary M. Collyer  
United States District Judge

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

COMPETITIVE ENTERPRISE INSTITUTE	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 13-1532 (RMC)
	)	
UNITED STATES ENVIRONMENTAL	)	
PROTECTION AGENCY	)	
	)	
Defendant.	)	

**PLAINTIFF’S MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS**

**I. Standard of Review**

In reviewing a motion to dismiss for under Federal Rule of Civil Procedure 12(b)(6), the court must accept “as true all of the factual allegations contained in the complaint,” and draw “all inferences in favor of the nonmoving party.” *Autor v. Pritzker*, 2014 WL 184506, \*3, --- F.3d --- (D.C. Cir. Jan. 17, 2014).

**II. Argument**

**A. Plaintiff’s Claim that EPA Policy and Practice Violates the Federal Records Act is Not Precluded by the Agency’s Representations Regarding Its Official Policy**

EPA argues that the agency’s representations regarding its policies, as declared in its exhibits, preclude review of its policies by this Court. *See* ECF No. 10-1 at 1-2, 13-15. But that is not the case. An agency’s stated policy and its true policy are not always the same, and the court may look to the agency’s true policy to determine whether the agency is in compliance with the law.<sup>1</sup>

---

<sup>1</sup> *See Lowery v. Circuit City Stores*, 206 F.3d 431, 443, 446 (4<sup>th</sup> Cir. 2000) (employer’s “written policy against race discrimination” did not prove policy of non-discrimination, although its guidance “on the federal anti-discrimination laws” for employees, showed a sufficiently clear awareness of its legal obligations that punitive damages could be awarded against it for disregarding them).

EPA claims that “the documents cited in CEI’s own Complaint make clear that the EPA requires employees to make a case-by-case evaluation of whether a particular text message qualifies as a federal record, and if so then the employee must take steps to ensure that the text message is appropriately preserved as such.” ECF No. 10-1 at 11-12. But while those documents constitute *admissions* by EPA that text messages can be federal records that must be preserved under the Federal Records Act, they do not reflect *actual* EPA policy or practice.

An agency’s actual policy may not be reflected in its “express statements of policy,” and may contradict both its stated policies, and governing legal standards. *See Parker v. District of Columbia*, 850 F.2d 708, 712 (D.C. Cir. 1988), *quoting Carter v. District of Columbia*, 795 F.2d 116, 122 (D.C.Cir.1986); *Woodward v. Correctional Medical Services of Illinois, Inc.*, 368 F.3d 917, 928, 922 (7<sup>th</sup> Cir. 2004) (finding illegal policy based on defendant’s “actual practice (as opposed to its written policy),” even though it was “contrary to written CMS policy and procedures.”). For example, an “employer's institution of a written policy against race discrimination” (including an anti-discrimination “seminar” for employees) concealed a “corporate policy of keeping African–Americans in low level positions,” used “to mask [intentional] race discrimination in promotional decisions” by company executives. *Lowery v. Circuit City Stores*, 206 F.3d 431, 443, 446 (4th Cir. 2000). Similarly, plaintiffs in another case “met their burden of proving that sex discrimination was the standard operating procedure” by the defendant against women as a class, “with respect to placement, promotion, [and] movement to full-time positions,” *Stender v. Lucky Stores*, 803 F.Supp. 259, 336 (N.D. Cal. 1992), sufficient to award “punitive damages,” *id.*, even though defendant's employment contract included an explicit “non-discrimination clause,” *id.* at 267-68, its affirmative action plan for women had “acknowledged that equal employment opportunity is legally required.” *id.* at 290,

and it had hired a lawyer to “to present a series of training programs regarding non-discriminatory promotion of females.” *Id.* at 270.

“The policy or custom used to anchor liability need not be contained in an explicitly adopted rule or regulation,” and may be shown through “persistent and widespread” practices or “custom” even when it “‘has not received formal approval through the body’s official decisionmaking channels.’” *Sorlucco v. N.Y.C. Police Department*, 971 F.2d 864, 870-71 (2d Cir. 1992), *quoting Monell v. Department of Social Services*, 436 U.S. 658, 691 (1978). The existence of a “policy or custom may be established in any of four ways,” including not just “(1) the existence of a formal policy,” but also “(2) actions taken or decisions made by” government “officials with final decision making authority,” “(3) a practice so persistent and widespread that it constitutes a custom of which constructive knowledge can be implied on the part of the policymaking officials; or (4) a failure by policymakers to properly train or supervise their subordinates, amounting to ‘deliberate indifference’ to the rights of those who come in contact with” them. *Prince v. County of Nassau*, 837 F.Supp.2d 71, 103 (E.D.N.Y. 2011) (citations omitted); *see Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986) (policy can be established by single decision of chief policymaker under appropriate circumstances); *City of Canton v. Harris*, 489 U.S. 378, 388 (1989) (“city can be liable” for policy based on “inadequate training of its employees” under appropriate circumstances); *Atchinson v. District of Columbia*, 73 F.3d 418, 421 (D.C.Cir.1996) (policy may be shown by failure to adequately train employees; liability exists where inadequate training “represent [s] ‘city policy’ ” and reflects “deliberate indifference to the rights” of plaintiffs); *Stoneking v. Bradford Area School Dist.*, 882 F.2d 720, 725 (3d Cir. 1989) (lawsuit could be maintained over policy of failing to take action with respect to complaints of sexual misconduct by teachers, even though such conduct violated governing

criminal laws; “appellants' argument that there was no policy, custom or practice is a merits issue, which we cannot resolve” on a pre-trial motion).

Plaintiff has set forth detailed factual allegations that the Administrator of the EPA, who is authorized to make and alter agency policy, took actions in clear defiance of both the Federal Records Act and past written EPA guidance about what constitutes a federal record, creating a *de facto* policy which sanctioned the destruction of text messages even when they were federal records, regardless of what EPA represents in writing to be its official policy. As EPA acknowledged in its memorandum, this Court can review the actual guidelines and practices of an agency with regard to record keeping. *See* ECF No. 10-1 at 14.

**B. Plaintiff Has Properly Raised a Claim Regarding the Failure by EPA’s Administrator to Notify the Archivist of Destruction of Federal Records.**

Plaintiff’s complaint states a claim under the Administrative Procedure Act based on EPA’s violations of the Federal Records Act, which mandates that “The head of each Federal agency shall notify the Archivist of any actual, impending, or threatened unlawful removal . . . or destruction of records in the custody of the agency of which he is the head that shall come to his attention, and with the assistance of the Archivist shall initiate action through the Attorney General for the recovery of” such records. 44 U.S.C. § 3106.

EPA concedes in its memorandum that “a private party’s APA lawsuit may challenge” an “agency head’s or the Archivist’s failure to seek initiation of an enforcement action” in violation of the Federal Records Act (FRA). *See* ECF No. 10-1 at 14, *citing Armstrong v. Bush*, 924 F.2d 282, 292-95 (D.C. Cir. 1991). “Under the FRA, an agency head’s enforcement duties are triggered” whenever any “unlawful removal” or “destruction of records in the custody of the agency . . . shall come to his attention.” *See* ECF No. 10-1 at 21-22. For example, “if an agency head learns of ‘any actual, impending, or threatened unlawful removal, defacing, alteration, or

destruction of records in the custody of the agency,’ then the agency head shall notify the Archivist. 44 U.S.C. § 3106.” *See* ECF No. 10-1 at 3.

The complaint alleges just such destruction of records, and just such a failure by an agency head to notify the Archivist as required by the FRA: It alleges that the EPA’s current and past Administrators were personally responsible for, and failed to take remedial action in response to, this destruction of records, *see* ECF No. 1 at ¶¶ 2-5, 24-26, 28-29. It notes that although EPA Administrators have “a duty under the Federal Records Act (FRA) not to destroy text messages,” and to “notify the Archivist [the head of the National Archives and Records Administration]” of such destruction, *id.* at ¶37, the Archivist has “[n]ever been notified of the destruction or loss of the records” as mandated by the statute. *Id.* at ¶38. “EPA’s pattern, practice, and ongoing policy of destroying, and not preserving, a class of records (text messages sent and received on EPA-supplied devices) violates the Federal Records Act . . . EPA’s failure to take remedial action and to notify the Archivist of the loss of the documents despite clear statutory mandates also is actionable under the APA.”<sup>32</sup> *See* ECF No. 1 at ¶ 40.

Further, the complaint alleges that the Administrator of the EPA was aware of the destruction of the federal records and of the duty triggered by knowledge of such destruction. EPA claims the duty was not triggered since the Administrator lacked such knowledge. *See* ECF No. 10-1 at 21. However, the Complaint alleges that the Administrator was the one who destroyed the federal records. This gives the Administrator actual knowledge of the destruction and triggered the duty to notify the Archivist.

---

<sup>32</sup> *See Armstrong v. Bush*, 924 F.2d 282, 295 (D.C. Cir. 1991) (“the FRA *requires* the agency head and Archivist to take enforcement action” in response to destruction of records; “On the basis of such clear statutory language mandating that the agency head and Archivist seek redress for the unlawful removal or destruction of records, we hold that the agency head’s and Archivist’s enforcement actions are subject to judicial review.”).

Moreover, the complaint explicitly seeks just such redress against this failure, requesting that “This Court . . . enter an injunction ordering EPA . . . to notify the head of the National Archives and Records Administration of any destruction, removal, or loss of such records.” *See* ECF No. 1 at ¶ 56.

This is sufficient to state a claim under the D.C. Circuit’s decision in *Armstrong v. Bush*, 924 F.2d 282, 295 (D.C. Cir. 1991), which ruled “that if the agency head or Archivist does nothing while an agency official destroys or removes records in contravention of agency guidelines and directives, private litigants may bring suit to require the agency head and Archivist to fulfill their statutory duty to notify” relevant officials and seek enforcement action. *Id.* (Even if the Complaint were not sufficiently explicit in making these allegations, the proper course would be to allow plaintiff to amend the complaint to make these allegations clear, rather than dismissing the case.<sup>3</sup> Nor did plaintiff have to explicitly seek this remedy, or any particular remedy, in order to state a claim for relief.<sup>4</sup>)

### **C. Defendant Misconstrues Plaintiff’s Factual Allegations**

The government argues that EPA has not in fact violated the Federal Records Act, since “not all text messages necessarily constitute federal records, and therefore not all text messages

---

<sup>3</sup> *See Armstrong*, 924 F.2d at 925 n. 10 (plaintiff could seek remedy ordering Archivist to request action by attorney general despite not alleging that Archivist had violated the FRA by failing to do so; while “Plaintiffs’ complaint did not specifically allege that the Archivist violated the FRA by failing to request that the Attorney General initiate an action to prevent the NSC staff from destroying records in contravention of the NSC’s guidelines,” “the district court on remand may allow plaintiffs to amend their complaint accordingly.”)

<sup>4</sup> Even if plaintiff had not explicitly requested that the archivist be notified in paragraph 56 of our complaint, the catch-all prayer for relief at the end of the Complaint for “such other and further relief as the Court shall deem proper” would encompass such relief. *See Rental Dev. Corp. of America v. Lavery*, 304 F.2d 839 (9<sup>th</sup> Cir. 1962) (absence from the lessees’ complaint of a request for cancellation of a lease for breach did not prejudice the lessor when a prayer for “such other relief as to the court may seem just and proper” was included, because counsel for both sides were aware prior to trial that cancellation might be asked); *Chicago & E. Illinois R.R. Co. v. Illinois Cent. R. Co.*, 261 F.Supp. 289 (N.D. Ill. 1962) (A court of equity is not limited by the precise demands of the pleadings, especially when the pleadings contain prayers for such other relief as the court may deem just and appropriate); *Amirmokri v. Baltimore Gas & Electric Co.* 60 F.3d 1126 (4th Cir. 1995); *Dingxi Longhai Dairy, Ltd. v. Becwood Technology Group L.L.C.*, 635 F.3d 1106, 1108 (8th Cir. 2011).

must be preserved.” However, Plaintiff has given a specific example of a text message that dealt with EPA-related activities and environment-related matters (and thus qualified as a federal record) yet was deleted. *See* ECF No. 1 at ¶ 26.<sup>5</sup>

Moreover, EPA’s argument that no text messages received by the Administrator should have been preserved is weak on the merits, since it is implausible to suggest that each and every one of the thousands of text messages destroyed<sup>6</sup> did not qualify as a federal record, and it violates the FRA to categorically treat them as beyond its reach. “While the agency undoubtedly does have some discretion to decide if a particular document satisfies the statutory definition of a record,” the Federal Records Act does not “allow the agency by fiat to declare ‘inappropriate for preservation’ an entire set of” electronic or “email documents” generated by high-ranking officials like Gina McCarthy over a multi-year period.<sup>7</sup>

---

<sup>5</sup> This is especially true given that the texts were sent and received using agency resources, making them presumptively agency records. *See* ECF No. 1 at ¶¶ 2, 4, 6. Based on EPA’s record keeping practices, even *personal* email accounts of high-ranking EPA officials with less of a nexus than this to agency business are likely to contain at least *some* federal records, as courts have recognized. *See Landmark Legal Foundation v. EPA*, 2013 WL 4083285, \*5 (D.D.C. Aug. 14, 2013) (denying summary judgment to EPA based on inadequate search, where “EPA did not search the *personal* email accounts of the Administrator, the Deputy Administrator, or the Chief of Staff. Landmark points to one disclosed record . . . as evidence that upper-level EPA officials conducted official business from their personal email accounts. . . . Landmark also points to several press reports and a Congressional Investigation into whether EPA officials ‘regularly use private communication accounts to conduct official government business’ ‘reportedly in part to avoid FOIA obligations.’”); *cf. Mollick v. Tp. of Worcester*, 32 A.3d 859, 872-73 (Pa.Cmwlth 2011) (“emails that document a transaction or activity” of an agency can be public “records” even if stored on officials’ “personal computers or in their personal email accounts”). These text messages are even more likely to be agency records, given that they were transmitted on EPA officials’ “EPA-assigned personal digital assistant.” *See* ECF No. 1 at ¶ 2.

The public import of the text message cited in ¶ 26 of the Complaint exceeds that of more mundane topics that the courts have held to nevertheless be of sufficient import not only to be agency records, but also to be subject to disclosure despite competing privacy interests, like the relocation incentives paid by a single office of an agency. *See, e.g., Yonemoto v. Department of Veterans*, 686 F.3d 681, 698-99 (9th Cir. 2012) (“there is a strong public interest in the primary substance of this email: how much the Honolulu VA has to pay to relocate employees it hires from other locales . . . and the possible effects of those incentives on hiring decisions.”).

<sup>6</sup> *See, e.g.,* ECF No. 1 at ¶ 4 (“EPA has produced documents revealing that Ms. McCarthy sent/received many thousands of text messages using her EPA-provided PDA, none of which EPA preserved.”)

<sup>7</sup> *See Armstrong v. Executive Office of the President*, 1 F.3d 1274, 1283 (D.C. Cir. 1993).



To the contrary, in construing the analogous term “agency records,” the D.C. Circuit has made clear that “records are presumptively disclosable unless the government can show” otherwise. *Consumer Federation of America v. Department of Agriculture*, 455 F.3d 283, 287-93 (D.C. Cir. 2006), *quoting Bureau of Nat'l Affairs, Inc. v. United States Dep't of Justice*, 742 F.2d 1484, 1494 (D.C.Cir.1984).<sup>8</sup> Under FOIA, “the strong presumption in favor of disclosure places the burden on the agency to justify the withholding of any requested documents.” *United States Department of State v. Ray*, 502 U.S. 164, 173 (1991). Moreover, the reasonable inference to be drawn from Plaintiff’s allegations of the Administrator’s actions is that text messages that qualify as federal records have been deliberately and repeatedly destroyed.

EPA also speculates that the destroyed records may still exist “in another format.”<sup>9</sup> But even if this is true, this mere possibility is insufficient to dismiss plaintiff’s claim at the pleading stage, where “all of the factual allegations contained in the complaint” must be taken as “true,” “all inferences” must be drawn in favor of plaintiff, *see Autor v. Pritzker*, 2014 WL 184506, \*3, - -- F.3d --- (D.C. Cir. Jan. 17, 2014), and defendant must show that the Plaintiff has failed to allege sufficient facts to take its claim beyond sheer speculation. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Plaintiff has raised plausible claims regarding the destruction of federal records in the form of text messages. It is not appropriate for the Defendant to raise unsupported and unproven facts not in the record at this stage.

#### **D. The Inapplicability of Some Relief Does Not Preclude Other Relief**

EPA argues that plaintiff has sought various *other* forms of relief that are not available under the APA, such as “document-specific” oversight of “EPA’s day-to-day management of

---

<sup>8</sup> *See also Cooper Cameron Corp. v. U.S. Dept. of Labor*, 280 F.3d 539, 545 (5<sup>th</sup> Cir. 2002) (“in judging agencies’ attempts to withhold information, courts use a ‘strong presumption in favor of disclosure.’”).

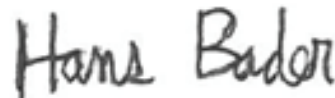
<sup>9</sup> *See* ECF No. 10-1 at 21.

text messages as federal records.” ECF No. 10-1 at 1. But “dismissal for failure to state a claim is not warranted merely because one form of requested relief is unavailable.” *Limbright v. Hofmeister*, 2010 WL 3385346, \*4 (E.D. Ky. Aug. 25, 2010). Similarly, the fact that EPA correctly notes that FOIA, another statute mentioned in the Complaint, is “purely a disclosure statute,” in no way affects plaintiff’s ability to seek relief for clear-cut violations of other statutes like the FRA, either through the APA or through mandamus. *See* ECF No. 10-1 at 2, 16.

### **III. Conclusion**

For the foregoing reasons, the Complaint states a claim for relief, and this Court should deny the defendant’s motion to dismiss.

Respectfully submitted this 10th day of February, 2014,

A handwritten signature in dark ink that reads "Hans Bader". The signature is written in a cursive, slightly slanted style.

Hans Bader, D.C. Bar No. 466545  
Sam Kazman, D.C. Bar No. 946376  
Christopher Horner D.C. Bar No. 440107  
Competitive Enterprise Institute  
1899 L St., N.W., 12<sup>th</sup> Floor  
Washington, D.C. 20036  
(202) 331-2278, [hbader@cei.org](mailto:hbader@cei.org)  
Attorneys for Plaintiff

**From:** [Anderson, Cindy](#)  
**To:** [Minoli, Kevin](#)  
**Cc:** [Miller, Kevin](#); [Nguyen, Quoc](#)  
**Subject:** FW: CEI v. EPA (13-1074) billing for Gina McCarthy text messages  
**Date:** Thursday, August 29, 2013 3:04:26 PM  
**Attachments:** [202-596-0247 - Jul 2010.pdf](#)  
[202-596-0247 - Message Events Count - Jul 09-Jun 12.xlsx](#)  
**Importance:** High

---

(b) (5) DPP, (b) (5) ACP, (b) (5) AWP

Would you please take a look at the pdf attached and give me a call?

(b) (5) DPP, (b) (5) ACP, (b) (5) AWP

Cindy  
564-2690

-----Original Message-----

**From:** Reilly, Tom  
**Sent:** Thursday, August 29, 2013 1:28 PM  
**To:** Anderson, Cindy  
**Cc:** Weinstock, Larry  
**Subject:** RE: CEI v. EPA (13-1074) billing for Gina McCarthy text messages

Cindy,

(b) (5) DPP, (b) (5) ACP, (b) (5) AWP

Let me know if you have any questions.

Tom

From: DAVIS, TANIKA  
Sent: Thursday, August 29, 2013 1:20 PM  
To: Reilly, Tom  
Subject: McCarthy Info

Tom,

(b) (5) DPP, (b) (5) ACP, (b) (5) AWP

Tanika Davis  
ECS Team - EPA ITS - ACT II Contractor  
Sr. Telecommunications Billing Analyst  
Information Management Group/Mobile Devices Business Office  
Tel: (919) 541-1823  
Fax: (919) 685-3118  
Email: davis.tanika@epa.gov

~~~~~  
\*\*\*PLEASE NOTE\*\*\* If you require Mobile Device related assistance, please use the following contacts:  
EZTech Locations - EPA Call Center 866-411-4372 (option 3) or EZTech@epa.gov All Other Locations - EPA Call  
Center at 866-411-4EPA or EPACALLCENTER@epa.gov

Act mindfully. Accept entirely. Move strongly. Think softly. Speak beautifully. Live simply. Love completely.

-----Original Message-----

From: Anderson, Cindy  
Sent: Thursday, August 29, 2013 12:54 PM  
To: Reilly, Tom; DAVIS, TANIKA  
Cc: Weinstock, Larry  
Subject: FW: CEI v. EPA (13-1074) billing for Gina McCarthy text messages  
Importance: High

Tom & Tanika -

(b) (5) DPP, (b) (5) ACP, (b) (5) AWP

?

Please feel free to call me to discuss.  
Thanks!

Cindy Anderson  
EPA/OGC  
(202) 564-2690

-----Original Message-----

From: Weinstock, Larry  
Sent: Thursday, August 29, 2013 12:38 PM  
To: Anderson, Cindy  
Subject: Re: CEI v. EPA (13-1074) billing for Gina McCarthy text messages

(b) (5) DPP, (b) (5) ACP, (b) (5) AWP

Larry

---

From: Anderson, Cindy  
Sent: Thursday, August 29, 2013 11:32:26 AM  
To: Weinstock, Larry  
Cc: Nebeker, Mark (USADC)  
Subject: FW: CEI v. EPA (13-1074) billing for Gina McCarthy text messages

Larry -

I know you're on your way out-of-town.

(b) (5) DPP, (b) (5) ACP, (b) (5) AWP

Cindy  
564-2690

-----Original Message-----

From: Nebeker, Mark (USADC) [<mailto:Mark.Nebeker@usdoj.gov>]  
Sent: Thursday, August 29, 2013 11:28 AM  
To: Anderson, Cindy  
Subject: FW: CEI v. EPA (13-1074)

Here is Horner's email. (b) (5) DPP, (b) (5) ACP, (b) (5) AWP?

-----Original Message-----

From: Christopher Horner [[mailto:chris\\_horner@cei.org](mailto:chris_horner@cei.org)]  
Sent: Thursday, August 29, 2013 11:19 AM  
To: Nebeker, Mark (USADC)  
Subject: Re: CEI v. EPA (13-1074)

Dear Mark,

Per the below and our telephone conversation of earlier this morning, it seems that if EPA would simply show us one of these documents we would be able to know if their response to date is, despite the point I made in the Aug. 20 email to you, below, nonetheless sufficient for our needs, and avoiding you filing an answer, setting forth a briefing schedule etc. It should take us less than five minutes of review to know that.

We would be able to determine whether we could dismiss if EPA can show us -- via dropbox or otherwise -- a copy of one of the responsive invoices, that is the invoice itself, or alternately just the "text"-relevant pages but again of the bill itself as requested in our narrowing. Of course, dismissal will depend upon whether there is certain responsive metadata that was not provided in the excerpted portions EPA placed into the spreadsheet provided to us. But providing just one such invoice or the relevant, narrowed part of just one of those responsive invoices would let us know if we can accept the provided information as a sufficient proxy for the records/excerpted, copied portions of the records themselves.

If it is then I should think we also can withdraw the follow-on FOIA request of ours (Aug 8?) that we discussed. If they would like a confidentiality agreement or agreed protection (via an agreed order, or otherwise) that we will return, and will not maintain or circulate the information then I'm happy to provide that. But in that event they cannot mask information it contains.

Let me know if that's feasible. Otherwise, please do send the proposed schedule to me for review.

Best,  
Chris

On 8/28/13 9:58 AM, "Nebeker, Mark (USADC)" <Mark.Nebeker@usdoj.gov> wrote:

> It is my understanding that the phone and text message bills to EPA  
> are sent only electronically in very large files on a monthly basis.  
> Each invoice is, in fact, on average about 43 megabytes. Were those  
> monthly bills to be printed out they would likely constitute 4,000 to  
> 6,000 pages for each PDF version of the invoice.  
>  
> In order to respond to your request, as clarified in your July 3 email  
> to Larry Weinstock, for billings for only text messages from the  
> mobile device that Gina McCarthy used during the time period you  
> indicated, the Office of Environmental Information compiled the  
> information provided to you by searching for the bill information  
> provided on Ms. McCarthy's phone. I hope this clarifies the Agency's actions for you.

>  
>

> -----Original Message-----

> From: Christopher Horner [[mailto:chris\\_horner@cei.org](mailto:chris_horner@cei.org)]  
> Sent: Tuesday, August 20, 2013 2:34 PM  
> To: Nebeker, Mark (USADC)  
> Subject: Re: CEI v. EPA (13-1074)

>

> Dear Mark,

>

> While I gave your email address on related correspondence in front  
> of me, I wanted to shoot you over what I was speaking about  
> yesterday. Our request re the phone/PDA bills was for the bills  
> themselves; when we narrowed, we agreed to narrow to the text message  
> portions of the bills themselves. EPA instead created the attached  
> doc, which on its face cites the invoice numbers from which the  
> information was obtained (See second column, "Invoice number", e.g.,  
> 6295614107, 6309086813, 6322520212, etc.). It is those invoices, whose numbers EPA cites in its nominal  
production, that we seek and that are responsive.

>

> Best,  
> Chris Horner

>

>  
> On 8/19/13 10:56 AM, "Anderson, Cindy" <anderson.cindy@epa.gov> wrote:  
>  
>> Chris -  
>>  
>> Mark Nebeker suggested that I send this FOIA response (mailed last  
>> Thursday, August 15) to you directly since his computer is still not  
>> operating today.  
>>  
>> Cindy Anderson  
>> EPA/OGC  
>> (202) 564-2690  
>> \_\_\_\_\_  
>> \_  
>> \_  
>>  
>> -----Original Message-----  
>> From: Anderson, Cindy  
>> Sent: Monday, August 19, 2013 10:28 AM  
>> To: 'mark.nebeker@usdoj.gov'  
>> Subject: CEI v. EPA (13-1074)  
>>  
>> Mark -  
>>  
>> Attached are the documents that were sent to CEI last Thursday,  
>> August 15, in response to FOIA request HQ-2013-005618 (for evidence  
>> of training that Gina McCarthy took regarding record-keeping, etc.).  
>>  
>> Thanks!  
>>  
>> Cindy Anderson  
>> EPA/OGC  
>> (202) 564-2690  
>>  
>>  
>

**From:** [Anderson, Cindy](#)  
**To:** [Weinstock, Larry](#)  
**Cc:** [Minoli, Kevin](#)  
**Subject:** FW: CEI v. EPA (13-1074)  
**Date:** Wednesday, August 28, 2013 10:54:22 AM  
**Importance:** High

---

Larry -

Mark Nebeker, our AUSA in this case, just sent this message this morning.

**(b) (5) DPP, (b) (5) ACP, (b) (5) AWP**

Cindy  
564-2690

-----Original Message-----

From: Nebeker, Mark (USADC) [<mailto:Mark.Nebeker@usdoj.gov>]  
Sent: Wednesday, August 28, 2013 9:59 AM  
To: Christopher Horner  
Subject: RE: CEI v. EPA (13-1074)

It is my understanding that the phone and text message bills to EPA are sent only electronically in very large files on a monthly basis. Each invoice is, in fact, on average about 43 megabytes. Were those monthly bills to be printed out they would likely constitute 4,000 to 6,000 pages for each PDF version of the invoice.

In order to respond to your request, as clarified in your July 3 email to Larry Weinstock, for billings for only text messages from the mobile device that Gina McCarthy used during the time period you indicated, the Office of Environmental Information compiled the information provided to you by searching for the bill information provided on Ms. McCarthy's phone. I hope this clarifies the Agency's actions for you.

-----Original Message-----

From: Christopher Horner [<mailto:chris.horner@cei.org>]  
Sent: Tuesday, August 20, 2013 2:34 PM  
To: Nebeker, Mark (USADC)  
Subject: Re: CEI v. EPA (13-1074)

Dear Mark,

While I gave your email address on related correspondence in front of me, I wanted to shoot you over what I was speaking about yesterday. Our request re the phone/PDA bills was for the bills themselves; when we narrowed, we agreed to narrow to the text message portions of the bills themselves. EPA instead created the attached doc, which on its face cites the invoice numbers from which the information was obtained (See second column, Invoice number", e.g., 6295614107, 6309086813, 6322520212, etc.). It is those invoices, whose numbers EPA cites in its nominal production, that we seek and that are responsive.

Best,  
Chris Horner

On 8/19/13 10:56 AM, "Anderson, Cindy" <[anderson.cindy@epa.gov](mailto:anderson.cindy@epa.gov)> wrote:

> Chris -  
>



> Mark Nebeker suggested that I send this FOIA response (mailed last  
> Thursday, August 15) to you directly since his computer is still not operating today.

>  
> Cindy Anderson  
> EPA/OGC  
> (202) 564-2690

> \_\_\_\_\_  
> \_

> -----Original Message-----

> From: Anderson, Cindy  
> Sent: Monday, August 19, 2013 10:28 AM  
> To: 'mark.nebeker@usdoj.gov'  
> Subject: CEI v. EPA (13-1074)

>  
> Mark -

>  
> Attached are the documents that were sent to CEI last Thursday, August  
> 15, in response to FOIA request HQ-2013-005618 (for evidence of  
> training that Gina McCarthy took regarding record-keeping, etc.).

>  
> Thanks!

>  
> Cindy Anderson  
> EPA/OGC  
> (202) 564-2690


>  
>

**From:** [Anderson, Cindy](#)  
**To:** [Minoli, Kevin](#)  
**Cc:** [Nguyen, Quoc](#)  
**Subject:** FW: CEI v. EPA (13-1074)  
**Date:** Thursday, August 29, 2013 3:08:25 PM  
**Attachments:** [CEI2.eot.docx](#) (b) (5) DPP, (b) (5) ACP, (b) (5) AWP  
**Importance:** High

---

CEI email response this morning to our Tuesday email explaining what it would require to provide all invoices.

(b) (5) DPP, (b) (5) ACP, (b) (5) AWP



Also attached here is the draft briefing schedule.

Cindy  
564-2690

-----Original Message-----

From: Nebeker, Mark (USADC) [<mailto:Mark.Nebeker@usdoj.gov>]  
Sent: Thursday, August 29, 2013 1:48 PM  
To: Christopher Horner  
Subject: RE: CEI v. EPA (13-1074)

Thanks. We'll look into your thoughts. Attached is a draft motion for briefing schedule that still needs review here, but can you tell me if Plaintiff is OK with it?

-----Original Message-----

From: Christopher Horner [[mailto:chris\\_horner@cei.org](mailto:chris_horner@cei.org)]  
Sent: Thursday, August 29, 2013 11:19 AM  
To: Nebeker, Mark (USADC)  
Subject: Re: CEI v. EPA (13-1074)

Dear Mark,

Per the below and our telephone conversation of earlier this morning, it seems that if EPA would simply show us one of these documents we would be able to know if their response to date is, despite the point I made in the Aug. 20 email to you, below, nonetheless sufficient for our needs, and avoiding you filing an answer, setting forth a briefing schedule etc. It should take us less than five minutes of review to know that.

We would be able to determine whether we could dismiss if EPA can show us -- via dropbox or otherwise -- a copy of one of the responsive invoices, that is the invoice itself, or alternately just the "text"-relevant pages but again of the bill itself as requested in our narrowing. Of course, dismissal will depend upon whether there is certain responsive metadata that was not provided in the excerpted portions EPA placed into the spreadsheet provided to us. But providing just one such invoice or the relevant, narrowed part of just one of those responsive invoices would let us know if we can accept the provided information as a sufficient proxy for the records/excerpted, copied portions of the records themselves.

If it is then I should think we also can withdraw the follow-on FOIA request of ours (Aug 8?) that we discussed. If they would like a confidentiality agreement or agreed protection (via an agreed order, or otherwise) that we will return, and will not maintain or circulate the information then I'm happy to provide that. But in that event they

cannot mask information it contains.

Let me know if that's feasible. Otherwise, please do send the proposed schedule to me for review.

Best,  
Chris

On 8/28/13 9:58 AM, "Nebeker, Mark (USADC)" <Mark.Nebeker@usdoj.gov> wrote:

> It is my understanding that the phone and text message bills to EPA  
> are sent only electronically in very large files on a monthly basis.  
> Each invoice is, in fact, on average about 43 megabytes. Were those  
> monthly bills to be printed out they would likely constitute 4,000 to  
> 6,000 pages for each PDF version of the invoice.  
>  
> In order to respond to your request, as clarified in your July 3 email  
> to Larry Weinstock, for billings for only text messages from the  
> mobile device that Gina McCarthy used during the time period you  
> indicated, the Office of Environmental Information compiled the  
> information provided to you by searching for the bill information  
> provided on Ms. McCarthy's phone. I hope this clarifies the Agency's actions for you.  
>  
>  
> -----Original Message-----  
> From: Christopher Horner [[mailto:chris\\_horner@cei.org](mailto:chris_horner@cei.org)]  
> Sent: Tuesday, August 20, 2013 2:34 PM  
> To: Nebeker, Mark (USADC)  
> Subject: Re: CEI v. EPA (13-1074)  
>  
> Dear Mark,  
>  
> While I gave your email address on related correspondence in front  
> of me, I wanted to shoot you over what I was speaking about  
> yesterday. Our request re the phone/PDA bills was for the bills  
> themselves; when we narrowed, we agreed to narrow to the text message  
> portions of the bills themselves. EPA instead created the attached  
> doc, which on its face cites the invoice numbers from which the  
> information was obtained (See second column, Invoice number", e.g.,  
> 6295614107, 6309086813, 6322520212, etc.). It is those invoices, whose numbers EPA cites in its nominal  
production, that we seek and that are responsive.  
>  
> Best,  
> Chris Horner  
>  
>  
> On 8/19/13 10:56 AM, "Anderson, Cindy" <[anderson.cindy@epa.gov](mailto:anderson.cindy@epa.gov)> wrote:  
>  
>> Chris -  
>>  
>> Mark Nebeker suggested that I send this FOIA response (mailed last  
>> Thursday, August 15) to you directly since his computer is still not  
>> operating today.  
>>  
>> Cindy Anderson  
>> EPA/OGC  
>> (202) 564-2690

>> \_\_\_\_\_  
>> \_  
>> \_  
>>  
>> -----Original Message-----  
>> From: Anderson, Cindy  
>> Sent: Monday, August 19, 2013 10:28 AM  
>> To: 'mark.nebeker@usdoj.gov'  
>> Subject: CEI v. EPA (13-1074)  
>>  
>> Mark -  
>>  
>> Attached are the documents that were sent to CEI last Thursday,  
>> August 15, in response to FOIA request HQ-2013-005618 (for evidence  
>> of training that Gina McCarthy took regarding record-keeping, etc.).  
>>  
>> Thanks!  
>>  
>> Cindy Anderson  
>> EPA/OGC  
>> (202) 564-2690  
>>  
>>  
>

**From:** [Kelly, Lynn](#)  
**To:** [Miller, Kevin](#)  
**Cc:** [Minoli, Kevin](#)  
**Subject:** FW: CEI v. EPA No. 13-1532: Request for consent to amend complaint  
**Date:** Monday, February 10, 2014 2:11:56 PM  
**Attachments:** [CEI v. EPA No. 13-1532 complaint Amended Draft 2.10.14.pdf](#)

---

Also FYI – CEI is requesting that we consent to amend their complaint in the Text Messages/FRA case. Their opposition to our motion to dismiss is due today.

I plan to discuss with the DOJ attorney – but wanted to alert you to this request from CEI.

Lynn Kelly | US EPA | Office of General Counsel | 1200 Pennsylvania Ave., NW | WJC North, Mail Code 2377A | Washington DC 20460 | phone: (202) 564-3266

The contents of this e-mail and any attachments to it may contain deliberative-process, attorney-client, attorney work product, or otherwise privileged material. If you are not the intended recipient, or believe you have received this communication in error, please delete the copy you received, and do not print, copy, retransmit, disseminate, or otherwise use the information. Thank you.

---

**From:** Schwei, Daniel S. (CIV) [<mailto:Daniel.S.Schwei@usdoj.gov>]  
**Sent:** Monday, February 10, 2014 1:37 PM  
**To:** Kelly, Lynn  
**Subject:** FW: CEI v. EPA No. 13-1532: Request for consent to amend complaint

FYI – I just got this e-mail from CEI. Let's both take some time to review, and then perhaps we can discuss this afternoon?

Thanks,  
Daniel

---

**From:** Hans Bader [<mailto:Hans.Bader@cei.org>]  
**Sent:** Monday, February 10, 2014 12:54 PM  
**To:** Schwei, Daniel S. (CIV)  
**Cc:** Sam Kazman  
**Subject:** CEI v. EPA No. 13-1532: Request for consent to amend complaint

Plaintiff seeks to amend its complaint in order to better clarify the relief sought. The amended complaint we would like to file will add few additional factual allegations (its intent is to make more explicit what was already at least implicit), and nothing that contradicts the original complaint. (As I recall, EPA viewed the original complaint as “meandering” and difficult to follow in certain respects.).

Do you consent to plaintiff thus amending its complaint? The draft amended complaint is attached (aside from correcting any typos or errors of form that may be discovered, I don't foresee any substantive changes in what we will file as the amended complaint). As you can see, there are no major changes to the complaint contained in it.

Thanks,

Hans Bader  
Counsel for Plaintiff Competitive Enterprise Institute  
[hbader@cei.org](mailto:hbader@cei.org)

(202) 331-2278

COMPETITIVE ENTERPRISE INSTITUTE )  
1899 L Street, N.W., 12<sup>th</sup> Floor )  
Washington, D.C. 20036 )  
 )  
Plaintiff, )  
 )  
v. ) Civil Action No. 13-1532 (RMC)  
 )  
UNITED STATES ENVIRONMENTAL )  
PROTECTION AGENCY )  
1200 Pennsylvania Avenue, N.W. )  
Washington, D.C. 20460 )  
 )  
Defendant. )

Plaintiff COMPETITIVE ENTERPRISE INSTITUTE (“CEI”) for its complaint against Defendant UNITED STATES ENVIRONMENTAL PROTECTION AGENCY (“EPA” or “the Agency”), alleges as follows:

- <sup>1</sup> See 44 U.S.C. §§ 2101 *et seq.*, 2901 *et seq.*, 3101 *et seq.*, 3301 *et seq.*

Administrator). On August 19, 2013, after obtaining documents indicating former EPA Administrator Lisa P. Jackson sent/received EPA-related text messages on May 27, 2010, CEI submitted another request for copies of text messages, this time for “copies of all EPA-related text messages sent and/or received by” Jackson on that date.

- 3) Defendant EPA has not provided any of the records responsive to either FOIA request. Instead, it has declared “no records” exist responsive to either request, because the Agency employees have destroyed them as part of a policy and practice of destroying such records, in violation of the FRA and FOIA. That is so even though both of the above EPA officials sent/received EPA-related text messages on EPA-provided accounts/devices assigned to them for EPA business.
- 4) EPA has subsequently produced documents to plaintiff revealing that Ms. McCarthy sent/received many thousands of text messages using her EPA-provided PDA, none of which EPA preserved. (This information was produced in response to a separate FOIA request, HQ-2013-006937, seeking phone bills related to Ms. McCarthy’s text messages. Plaintiff has not obtained any billing information regarding Ms. Jackson’s account(s)).
- 5) Text messaging is provided to certain EPA officials as an alternative medium of communication to email, both means which are provided specifically for the purpose of enabling performance of official functions. For example, in the discrete May 27, 2010 text message plaintiff became aware of former EPA Administrator Lisa Jackson used her text messaging function to discuss a potential green-jobs opportunity for a “cotton absorbent company” whose CEO she apparently met at a “Climate Rally” in her capacity as EPA administrator. But when plaintiff sought those very text messages referenced in an email obtained under FOIA and addressed to Jackson in her capacity as “Administrator Jackson,”



EPA issued a “no-records” response. This reflected that the texts, which like email are “created” when sent or received, were destroyed by EPA.

- 6) EPA further indicated in response to plaintiff that while text messages can be federal records, just like email, unlike email none of the thousands of text messages plaintiff requested were in fact preserved, despite many having a facial relationship to EPA’s work, on the grounds that such communications are “unrecord material not subject to the Federal Records Act,”<sup>2</sup> and that it is EPA’s position to allow Agency officials to destroy their correspondence, which represents the Agency’s sole copy of such correspondence.
- 7) EPA does not permit employees to destroy the Agency’s sole copy of email, although no inherent substantive distinction exists between texts and emails sent by EPA officials using devices provided by the agency.<sup>3</sup> Like emails, their transmission and content are of

---

<sup>2</sup> See September 18, 2013 letter from Eric E. Wachter, Director, EPA Office of the Executive Secretariat, to Christopher C. Horner, CEI, at 1 (“no records exist” responsive to request HQ-2013-009235 for “copies of all EPA-related text messages sent and/or received by Lisa P. Jackson on May 27, 2010”; EPA claims that “not all documents created by government employees are subject to preservation under the Federal Records Act. As with all electronic communication, EPA employees are required to determine whether text messages are record material and to preserve as appropriate. The text messages described in the example your provide certainly suggest unrecord material not subject to the Federal Records Act.”)

Under 44 U.S.C. § 3301 records include “all. . . machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency . . . as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of the data in them.”

EPA acknowledges on its website that “[t]he definition of a record under the Freedom of Information Act (FOIA) is broader than the definition under the Federal Records Act.” See, e.g., Environmental Protection Agency, *What Is a Federal Record?*, <http://www.epa.gov/records/tools/toolkits/procedures/part2.htm>.

<sup>3</sup> See *Frequent Questions about Mobile and Portable Devices, and Records*, [www.epa.gov/records/faqs/pda.htm](http://www.epa.gov/records/faqs/pda.htm) (“Common Agency records maintained on Mobile Devices include e-mail . . . and any other information related to your work at EPA. . . Records created on your Mobile Device should be transferred to your office's recordkeeping system on a regular basis. . . **Is the information on my Mobile Device subject to FOIA . . . ?** Yes, information on your Mobile Device may be requested under FOIA or in response to litigation. **My Mobile**

significant public interest, especially due to EPA's recurrent failure to produce text message transcripts in response to FOIA and congressional oversight requests for specified "records" and "electronic records" in particular.

- 8) EPA's practice of allowing employees to unilaterally and immediately destroy an the Agency's sole copies of an entire class of records is unlawful, regardless of what the medium of communication is. "While the agency undoubtedly does have some discretion to decide if a particular document satisfies the statutory definition of a record," the Federal Records Act does not "allow the agency by fiat to declare 'inappropriate for preservation' an entire set of" electronic or "email documents" generated by high-ranking officials like Gina McCarthy over a multi-year period.<sup>4</sup>
- 9) EPA has failed to preserve these documents despite previously being warned by the courts to stop deleting and destroying electronically-stored information and other documents. *See, e.g., Union Pac. R.R. Co. v. U.S. Envtl. Prot. Agency*, 2010 WL 2560455 (D. Neb. June 24, 2010) (granting temporary restraining order against EPA, enjoining the EPA from deleting or

---

**Device was not provided by the Agency. Do these rules still apply to me?** Yes, if you have Agency records on a personally-owned Mobile Device, they still need to be captured in an approved recordkeeping system.");

36 C.F.R. 1236.22 ("electronic mail records" covered; "Agencies that allow employees to send and receive official electronic mail messages using a system not operated by the agency must ensure that Federal records sent or received on such systems are preserved"); *see also, Armstrong v. Executive Office of the President*, 1 F.3d 1274, 1284, 1288 (D.C. Cir. 1993) ("electronic communications systems contain preservable records" covered by the Federal Records Act," and "do produce federal records"); *Id.* at 1288 ("agencies have an obligation . . . to undertake periodic [compliance] reviews to assure that" record preservation procedures "are being adhered to," requirements that "apply to all electronic systems used by agency employees to create electronic records, not just . . . to 'official' agency electronic records systems . . . defendant agencies must undertake some periodic review of their employees' electronic recordkeeping practices."); *Landmark Legal Foundation v. EPA*, 2013 WL 4083285, \*5 (D.D.C. Aug. 14, 2013) (denying EPA summary judgment in FOIA case where EPA did not search the individual "email accounts of the Administrator, the Deputy Administrator, or the Chief of Staff,"; noting "the possibility. . . that leaders in the EPA may have purposefully attempted to skirt disclosure under the FOIA.").

<sup>4</sup> *See Armstrong v. Executive Office of the President*, 1 F.3d 1274, 1283 (D.C. Cir. 1993).

destroying any potentially relevant electronically-stored information, and also ordering EPA to identify, collect, and preserve such information relevant to company's FOIA request as well as designate an expert on electronically-stored information to "insure the enforcement" of the temporary restraining order, in light of evidence that "the EPA has engaged in a practice of deleting relevant emails in response to Union Pacific's FOIA request"; eight emails indicated EPA official instructed employees to destroy documents and delete emails relevant to company's FOIA request).<sup>5</sup>

- 10) Plaintiff CEI states on information and belief that a senior Agency official cautioned Ms. McCarthy to cease sending text messages due to concerns about the propriety of the content of her texting about congressional oversight efforts specifically on days when she testified before either the House or Senate. This information prompted plaintiff's first request for text messages sent or received on those eighteen dates she appeared before one or the other body.
- 11) Since all of the text messages at issue were sent or received by the EPA's current administrator and her predecessor, these records and whether EPA fulfilled its obligation to maintain and to produce them are of significant public interest. This is especially true given that Ms. McCarthy, specifically, was the official charged with responsibility for ensuring that recordkeeping laws were complied with, and therefore presumably was aware of the propriety and implication of destroying the sole copies of her own correspondence.
- 12) Despite the above, and in the face of revelations about organized and systemic abuses by senior federal employees to hide from the public their activities, particularly their electronic

---

<sup>5</sup> See also *Landmark Legal Foundation v. E.P.A.* 2013 WL 4083285 (D.D.C. Aug. 14, 2013) (judge denied EPA summary judgment based on "the potential spoliation of records that should have been searched" (*id.* at \*8 n.7), and EPA's previous record of contempt in a related matter, *id.*, as well as the "possibility that EPA engaged in ... apparently bad faith interpretation" of a FOIA request. *Id.* at \*6). *Union Pacific R. Co. v. U.S. E.P.A.*, 2010 WL 3455240 (D. Neb. Aug. 26, 2010) (granting preliminary injunction against EPA).

communications,<sup>6</sup> EPA has failed to preserve these documents (as required by the Federal Records Act), much less to produce them in response to FOIA requests. EPA has failed to preserve these documents despite previously being warned by the courts to stop erasing and failing to preserve documents. Plaintiff asserts on information and belief that EPA has also failed to notify the National Archivist as required when it learns of such potential loss of records; as Ms. McCarthy was the responsible officer as well as the party destroying her own correspondence, EPA has been aware of this practice for several years but it also has been specifically otherwise informed by virtue of the FOIA proceedings cited, *supra*.

13) Accordingly, plaintiff files this lawsuit to compel EPA to comply with the law.

### **PARTIES**

---

<sup>6</sup> See, e.g., Stephen Dinan, *EPA Officials Lied About Email Use, Senator Says*, Washington Times, March 11, 2013, at A4 (“Mr. Martin and Ms. Jackson both resigned last month, after Mr. Vitter and Rep. Darrell E. Issa, California Republican and chairman of the House oversight committee, began an investigation into the emails”); *U.S. Senator David Vitter Hearing Statement Summary: Nomination Hearing for Ms. Gina McCarthy to Lead U.S. Environmental Protection Agency Before the Senate Committee on Environment and Public Works*, U.S. Federal News, April 11, 2013 (“EPA Region 8 Administrator James Martin resigned after lying to a federal court, and after EPA lied that he was not using his private email account to conduct official business in violation of the Federal Records Act and the Freedom of Information Act”); Stephen Dinan, *Do Text Messages from Feds Belong on Record? EPA’s Chief’s Case Opens Legal Battle*, Washington Times, April 30, 2011, at A1 (discussing how CEI’s Christopher Horner “exposed former EPA chief Lisa P. Jackson’s private email account” and those of other EPA officials; and how “several congressional committees looking into the EPA also discovered other agency officials using personal emails to conduct government business - a violation of the Freedom of Information Act”; “The EPA’s internal auditor also is looking into how well the agency is complying with the law.”); Dinan, *EPA Staff to Retrain on Open Records; Memo Suggests Breach of Policy*, Wash. Times, Apr. 9, 2013, at A4 (“The Environmental Protection Agency . . . acknowledged that it needs to do better at storing instant-message communications, after the agency came under severe fire from members of Congress who say it appears to have broken those [open-government] laws” in an apparent “admission that the agency has fallen short on its obligations.”); Dinan, *Suit Says EPA Balks at Release of Records; Seeks Evidence of Hidden Messages*, Wash. Times, Apr. 2, 2013, at A1 (“EPA officials were using private email addresses to conduct official business”; “James Martin, who at the time was administrator of EPA’s Region 8, used his personal email account to collaborate with the Environmental Defense Fund about where hearings on agency greenhouse gas rules could be held for maximum effect.”).

- 14) Plaintiff CEI is a public policy research and educational institute in Washington, D.C., dedicated to advancing responsible regulation and in particular economically sustainable environmental policy. CEI's programs include research, investigative journalism and publication, as well as a transparency initiative seeking public records relating to environmental policy and how policymakers use public resources. CEI regularly files, and will continue to file, FOIA requests with EPA, as part of this initiative, as is illustrated by a number of such cases on this Court's docket.<sup>7</sup>
- 15) Defendant EPA is a federal agency headquartered in Washington, D.C..

### **JURISDICTION AND VENUE**

- 16) This Court has jurisdiction pursuant to 5 U.S.C. § 552(a)(4)(B), because this action is brought in the District of Columbia, and 28 U.S.C. § 1331, because the resolution of disputes under FOIA presents a federal question (as do resolution of disputes under the Federal Records Act; the Administrative Procedure Act; and the Mandamus Act, all of which are applicable in this case. This court also has jurisdiction of the mandamus claim pursuant to 28 U.S.C. § 1361).
- 17) Venue is proper under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e) because plaintiff resides in the District of Columbia, and defendant EPA is a federal agency.

### **FURTHER FACTUAL BACKGROUND**

- 18) EPA has not provided any records in response to CEI's FOIA request for former Assistant Administrator (and current EPA Administrator) McCarthy's text messages or former Administrator Jackson's text messages.

---

<sup>7</sup> See, e.g., *Competitive Enterprise Institute v. Environmental Protection Agency*, D.D.C. civil actions ## 12-1497, 12-1617, 13-406, 13-434, 13-624, 13-779, 13-1074 (all involving FOIA requests to EPA by plaintiff).

- 19) EPA has also not provided any text messages in response to congressional requests for certain described “all records” or “all electronic records”, involving any employee.
- 20) EPA has also not provided any text messages in response to FOIA requests by others for certain described “all records” or “all electronic records”, involving any employee.
- 21) This is despite the fact that transparency in government is the subject of high-profile vows by the president and attorney general that FOIA will “be administered with a clear presumption: In the face of doubt, openness prevails” (*See Attorney General Eric Holder, OIP Guidance, President Obama’s FOIA Memorandum and Attorney General Holder’s FOIA Guidelines, Creating a “New Era of Open Government”,* <http://www.justice.gov/oip/foiapost/2009foiapost8.htm>; *Memorandum for the Heads of Executive Departments,* [www.whitehouse.gov/the\\_press\\_office/Freedom\\_of\\_Information\\_Act](http://www.whitehouse.gov/the_press_office/Freedom_of_Information_Act).)

**Plaintiff CEI's FOIA Request for Certain Specified  
Text Messages of Gina McCarthy (EPA-HQ-2013-006005)**

- 22) On April 26, 2013, CEI submitted a FOIA Request by electronic mail, seeking:
- copies of all text messages sent by Assistant Administrator for Air and Radiation Gina McCarthy on a mobile telephone provided for her use by the Agency, on the following eighteen days:
- 2009: July 9, 2009; July 14, 2009
- 2010: July 22, 2010; March 4, 2010; March 24, 2010
- 2011: March 1, 2011; March 13, 2011; March 24, 2011; April 13, 2011; May 13, 2011; June 30, 2011; September 8, 2011; September 15, 2011; October 12, 2011; October 25, 2011
- 2012: February 28, 2012; June 19, 2012; June 29, 2012.

**Defendant’s Response to Plaintiff’s FOIA Request**

- 23) EPA assigned this request identification number EPA-HQ-2013-006005 by letter dated and sent by email on May 9, 2013.

- 24) Defendant EPA's only response was to acknowledge receipt of the request, say it would respond to the request at some unspecified future time, and inform CEI that its request was "non-billable" under FOIA.<sup>8</sup> (Typically, FOIA requests are non-billable when they can be handled in two hours or less. *See* 5 U.S.C. § 552(a)(4)(A)(iv)). This does not constitute the required substantive response.<sup>9</sup>
- 25) In light of EPA's failure to provide any substantive response within the 20-day deadline for responding to FOIA requests, CEI, having exhausted its administrative remedies, sued EPA for its non-compliance with FOIA on May 29, 2013.<sup>10</sup>
- 26) After CEI sued, EPA provided plaintiff with a "no records" response. EPA stated that it has been unable to locate any such texts in response to plaintiff's FOIA request.<sup>11</sup> It did so even though Ms. McCarthy sent or received many thousands of such text messages over the covered period, as plaintiff subsequently learned, such that on the basis of information later

---

<sup>8</sup> *See* May 9, 2013 letter from National FOIA Officer Larry Gottesman to CEI counsel Christopher Horner.

<sup>9</sup> *See CREW v. FEC*, 711 F.3d 180, 186 (D.C. Cir. 2013) ("CREW") (administrative remedies are deemed exhausted unless, within the 20-day period, agency has at least informed the requesting party of the scope of potentially responsive records, including the scope of the records it plans to produce and withhold under any FOIA exemptions).

<sup>10</sup> *See Complaint in Competitive Enterprise Institute v. United States Environmental Protection Agency*, D.D.C. Civil Action No. 13-779; *Answer* ¶¶36 (not denying plaintiff had exhausted its administrative remedies), ¶¶ 25-27 (not denying the specific facts showing exhaustion).

<sup>11</sup> *See, e.g., Answer in Competitive Enterprise Institute v. Environmental Protection Agency*, D.D.C. No. 13-779 (filed 7/19/2013) at ¶ 8 (conceding that such texts were sent by EPA Assistant Administrator Gina McCarthy), ¶21 (conceding that EPA provides such officials "with personal digital assistants that have text messaging capability"), ¶¶14, 33 (EPA currently unable to locate such records); Email from Michelle Lo, counsel for EPA, to Chris Horner and Hans Bader, counsel for CEI, at 9/9/2013 3:46 PM (admitting that "Ms. McCarthy uses text messaging," but arguing that "they were not required to be preserved by the Agency."); Email from Michelle Lo, counsel for EPA, to Chris Horner and Hans Bader, counsel for CEI, at 8/1/2013 7:25 PM (conceding that "Ms. McCarthy used the texting function on her EPA phone," and that "none of her texts over the period encompassing the 18 specific dates at issue in CEI's FOIA request (July 9, 2009, to June 29, 2012) were preserved").

obtained,<sup>12</sup> the statistical probability that Ms. McCarthy did not text on any of those eighteen dates is virtually zero.<sup>13</sup> Plaintiff subsequently learned that EPA did not preserve text messages from those eighteen dates or otherwise.<sup>14</sup> CEI dismissed that suit without prejudice in light of the claim that no responsive documents remained. *See Stipulation of Dismissal*, 9/13/2013 (docket #8). CEI later obtained the information showing that in fact EPA was not preserving, and instead was destroying, all such correspondence.

**Plaintiff CEI's FOIA Request for Certain Specified Text  
Text Messages of Lisa P. Jackson (EPA-HQ-2013-009235)**

- 27) On August 19, 2013, plaintiff submitted a FOIA request seeking “copies of all EPA-related text messages sent and/or received by Lisa P. Jackson on May 27, 2010.”
- 28) This FOIA request, submitted to EPA by email to [hq.foia@epa.gov](mailto:hq.foia@epa.gov), sought to obtain the text messages in which former EPA Administrator Lisa Jackson reportedly discussed business opportunities sought by a “cotton absorbent company” whose CEO the email described her as meeting at a “Climate Rally.”<sup>15</sup> These text messages, as described in Jackson’s own email

---

<sup>12</sup> See document sent by EPA to plaintiff’s counsel attached to July 26, 2013 email to Chris Horner, with PDF file bearing the title “202-596-0247 - Text bill - Jul 09-June 12.pdf,” produced in response to FOIA Request HQ-2013-006937, which sought certain text-related phone bills and invoices. That document provided certain metadata showing 5,392 text messages sent or received by Ms. McCarthy during billing periods from July 2009 to July 2012.

<sup>13</sup> See document sent by EPA to plaintiff’s counsel attached to Aug. 20 Horner email, with PDF file bearing the title “202-596-0247 - Text bill - Jul 09-June 12.pdf,” produced in response to FOIA Request HQ-2013-006937 (submitted, June 3, 2013). CEI staff estimated the odds of this actually occurring as one in 7.9 sextillion. See <http://cei.org/news-releases/odds-epa-not-destroying-gina-mccarthy-text-messages-1-79-sextillion> (calculation available at [www.scribd.com/doc/157256436/McCarthy-Texting-Probability](http://www.scribd.com/doc/157256436/McCarthy-Texting-Probability))

<sup>14</sup> See, e.g., email from Michelle Lo, FN 11, *supra*.

<sup>15</sup> See Email from EPA Administrator Lisa Jackson using her EPA “Richard Windsor” account to Aaron Dickerson, 6/4/2010 3:36 PM, enclosing email from Michael Martin to Aaron Dickerson, May 27, 2010, at 18:43:30 (“Administrator Jackson and I had txt’d this am about” a green-jobs opportunity for a “cotton absorbent company” Jackson had met at “the Climate Rally”). This email can be found in *Freedom of Information Act Request HQ-FOI-01268-12*, Fourth Release (04/15/13), Part C, on the 22<sup>nd</sup> of 508 pages in that document, which is currently available at [www.epa.gov/epafoia1/docs/Release-4-Part-C.pdf](http://www.epa.gov/epafoia1/docs/Release-4-Part-C.pdf) (visited 10/2/ 2013). It is one of the releases



thread, occurred in the context of EPA's involvement in the clean-up efforts surrounding the Deepwater Horizon drilling platform explosion and oil leak in the Gulf of Mexico, and the company in question sought to promote its purportedly environmentally-friendly products to the EPA for use in conjunction with the cleanup.

### **Defendant's Response to Plaintiff's FOIA Request**

- 29) EPA assigned this request identification number EPA-HQ-2013-009235.
- 30) Although the text messages' occurrence was memorialized in Administrator Jackson's own email addressing the subject,<sup>16</sup> an email that EPA produced as being work-related, on September 18, 2013, EPA issued a "no-records" response, reflecting the correspondence's destruction by EPA.
- 31) EPA indicated that the messages had not been preserved, despite their obvious relation to EPA's work like the email referencing them, and despite their being addressed to Jackson in her capacity as "Administrator Jackson," on the grounds that such communications are "unrecord material not subject to the Federal Records Act," and so EPA destroys them.<sup>17</sup> It appears that this destruction is performed by the individual employees destroying the Agency's sole copy of the correspondence.
- 32) In that September 18, 2013 "no records" letter, Eric E. Wachter, the Director of EPA's Office of the Executive Secretariat, did not deny that Jackson exchanged such messages, but excused EPA's failure to produce them with the assertion that "not all documents created by government employees are subject to preservation under the Federal Records Act. As with

---

of documents in response to a FOIA request that is currently found on EPA's *Frequently Requested Records* page, available at [www.epa.gov/epafoia1/frequent.html](http://www.epa.gov/epafoia1/frequent.html).

<sup>16</sup> See footnote 15 above.

<sup>17</sup> See September 18, 2013 letter from Eric E. Wachter, Director, EPA Office of the Executive Secretariat, to Christopher C. Horner, at 1 ("no records exist" responsive to request HQ-2013-009235 for "copies of all EPA-related text messages sent and/or received by Lisa P. Jackson on May 27, 2010" for this reason).

all electronic communication, EPA employees are required to determine whether text messages are record material and to preserve as appropriate. The text messages described in the example you provide certainly suggest unrecord material not subject to the Federal Records Act.”

- 33) Wachter did not explain what constitutes “unrecord material,” or why he used this peculiar phrase defined nowhere in any statute, regulation, or dictionary. Assuming that “unrecord material” means documents not covered by federal records laws, he did not explain how EPA-related communications could possibly *not* be subject to such laws (like the Federal Records Act and FOIA, which has the broadest definition of record among relevant laws), for example when addressed to senior EPA officials like Jackson in their official capacity; are exchanged with such officials using EPA-supplied devices for creating and transmitting records; and address a subject whose discussion, in email form, was preserved and produced under FOIA as an agency “record.” He also did not address the obvious question he begged of how an entire class of records, which he acknowledges in theory can be records, is being destroyed because in practice all are “unrecord material”.
- 34) Mr. Wachter was acting as a high-ranking agency official in charge of EPA FOIA and record-keeping policies and practices when asserting this position that a class of records which, when the substantively same correspondence is transmitted via a legally equivalent medium (email), are in great part being preserved but are not preserved and instead are destroyed when transmitted by the alternative to email EPA provides, text messaging, as “unrecord material”. Wachter heads the office that is in charge of “processing Freedom of Information (‘FOIA’) requests for the Office of the Administrator; maintaining the records of the Administrator and Deputy Administrator; managing the Administrator’s and Deputy

Administrator's executive correspondence; and administering the EPA's electronic correspondence tracking system.”<sup>18</sup> Moreover, the policy and/or practice of document destruction and failure to preserve documents directly involves high-ranking EPA officials, such as its current and former Administrator, who are specifically assigned responsibility for agency policy but who are destroying their own sole Agency copy of an entire class of correspondence.

- 35) In another FOIA case before this Court concluded earlier this year, seeking EPA-related emails on the non-official email account of then-Region 8 Administrator James Martin, EPA similarly asserted that such correspondence were not Agency records,<sup>19</sup> only to eventually abandon that position.
- 36) In the *Landmark* case cited, *supra*, another judge of this Court concluded that Mr. Wachter's declaration was seriously lacking in credibility. *See Landmark Legal Foundation v. E.P.A.* 2013 WL 4083285, \*6 (D.D.C. Aug. 14, 2013). In that case, Judge Lamberth repeatedly found that central claims made by Mr. Wachter were “inconsistent” (*id.* at \*\*1-2 & fn. 3) and “vague” (*id.* at \*3) and that Mr. Wachter's evasive “silence speaks volumes” (*id.* at 5).

### **LEGAL ARGUMENTS**

#### **Text Messages are “Agency Records” Under Federal Record-Keeping and Disclosure Laws, and Under EPA's Implementing Policies**

- 37) EPA provides certain employees with PDAs and text messaging capability as an alternative to email for official or otherwise work-related internal or external communications.
- 38) Text messaging correspondence may be Agency records, are subject to FOIA, and must be maintained and produced as such, under the Federal Records Act and FOIA. *See, e.g.,*

---

<sup>18</sup> *See Search Declaration of Eric E. Wachter*, at ¶2, in *CEI v. EPA*, No. 12-1617 (D.D.C. filed, 8/21/2013) (docket doc. # 24-4).

<sup>19</sup> *See CEI v. EPA*, D.D.C. Civil Action No. 12-1497 (ESH), *Memorandum of Points and Authorities In Support of Defendant's Motion for Summary Judgment* at 4-5.

National Archives, *Frequently Asked Questions About Instant Messaging*,

<http://www.archives.gov/records-mgmt/initiatives/im-faq.html> (Instant Messaging (IM)

content can “qualify as a Federal Record,” since IM “allows users” to “exchange text messages,” which are “machine readable materials” and thus within the “statutory definition of records”); *Frequent Questions about E-Mail and Records*,

<http://www.epa.gov/records/faqs/email.htm>; *Frequent Questions about Mobile and Portable Devices, and Records*, [www.epa.gov/records/faqs/pda.htm](http://www.epa.gov/records/faqs/pda.htm); *Memo to All Staff*,

“*Transparency at EPA*,” by Acting Administrator Bob Perciasepe, dated April 8, 2013 (“the Inspector General currently is conducting an audit of the agency’s records management practices and procedures. We have suggested they place focus on electronic records including email and instant messaging. While we have made progress in these areas, we are committed to addressing any concerns or weaknesses that are identified in this audit . . . to strengthen our records management system”).<sup>20</sup>

- 39) Former EPA Administrator Jackson and current EPA Administrator McCarthy had a duty under the Federal Records Act (FRA) not to destroy text messages, and to take remedial action once such destruction occurred. For example, under the FRA, each agency head

shall notify the Archivist [the head of the National Archives and Records Administration] of any actual, impending, or threatened unlawful removal, defacing, alteration, or destruction of records in the custody of the agency of which he is the head that shall come to his attention, and with the assistance of the Archivist shall initiate action through the Attorney General for the recovery of records he knows or has reason to believe have

---

<sup>20</sup> See also April 11, 2008 memorandum from John B. Ellis, EPA, to Paul Wester, National Archives and Records Administration, at 4 (reporting discovery of record-keeping problems), available at [http://www.epw.senate.gov/public/files/2008\\_EPA\\_Archives\\_Memo\\_HILITED.pdf](http://www.epw.senate.gov/public/files/2008_EPA_Archives_Memo_HILITED.pdf); *Records and ECMS Briefing, EPA Incoming Political Appointees 2009*, [http://www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore\\_id=60afa4b3-3e5d-4e6f-b81e-64998f0d3c67](http://www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=60afa4b3-3e5d-4e6f-b81e-64998f0d3c67).

been unlawfully removed from his agency, or from another Federal agency whose records have been transferred to his legal custody.<sup>21</sup>

EPA has responded to such information by informing the Archivist, in the past, when learning of similar destruction of emails.<sup>22</sup>

- 40) However, neither Jackson nor McCarthy has taken any such action, despite having the duty to do so in their capacity as head of the agency (indeed, according to EPA they are the officials who destroyed their own correspondence). Nor has the Archivist ever been notified of the destruction or loss of the records. Nor has EPA taken other remedial actions, as is required to comply with its duty under the FRA to “establish safeguards against the removal or loss of records he determines to be necessary and required by regulations of the Archivist”<sup>23</sup> and “make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency....”<sup>24</sup>

### **FIRST CLAIM FOR RELIEF**

#### **Duty to Preserve and Not Destroy Text Messages -- Declaratory Judgment**

- 41) Plaintiff re-alleges paragraphs 1-40 as if fully set out herein.
- 42) EPA’s pattern, practice, and ongoing policy of destroying, and not preserving, and/or allowing the employee-correspondent to unilaterally destroy the Agency’s sole copy of a class of records (text messages sent and received on EPA-supplied devices, including work-related or possibly work-related correspondence) violates the Federal Records Act and illegally denies the public access to records covered by the Freedom of Information Act.<sup>25</sup> It

---

<sup>21</sup> 44 U.S.C. § 3106.

<sup>22</sup> See April 11, 2008 “Ellis” memo, FN 20, *supra*, at 1-3.

<sup>23</sup> Id. § 3105.

<sup>24</sup> 44 U.S.C. § 3101.

<sup>25</sup> See, e.g., *Payne Enters., Inc. v. United States*, 837 F.2d 486, 491 (D.C.Cir.1988) (separate from claims seeking relief for specific FOIA requests, requesting parties may also assert a “claim

is also arbitrary and capricious agency action that violates the Administrative Procedure Act (APA), 5 U.S.C. § 704, et seq.<sup>26</sup>

- 43) Plaintiff CEI regularly files FOIA requests with EPA seeking agency records, as the docket of this District illustrates.<sup>27</sup> CEI has filed, and will continue to file, such FOIA requests seeking emails, text messages, and instant messages from EPA regarding high-ranking EPA officials, including those encompassed by the Office of the Administrator and the Assistant Administrator for the Office of Air and Radiation. This is part of CEI's ongoing transparency initiative seeking public records relating to environmental policy and how policymakers use public resources.
- 44) Plaintiff has sought and been denied production of responsive records reflecting the conduct of official business.
- 45) Plaintiff has a statutory right to the information it seeks.
- 46) Defendant has acknowledged, directly and through counsel, destroying these correspondence.
- 47) Moreover, federal regulations mandate that "Records shall not be disposed of while they are the subject of a pending . . . lawsuit under the FOIA" such as this one (or plaintiff's previously-filed FOIA lawsuits seeking electronic records).<sup>28</sup>

---

that an agency policy or practice will impair the party's lawful access to information in the future"); *Hajro v. U.S. C.I.S.*, 832 F.Supp.2d 1095 (N.D. Cal. 2012) (attorneys could bring lawsuit challenging pattern or practice of agency delays in responding to Freedom of Information Act requests submitted on behalf of their client).

<sup>26</sup> See, e.g., *CREW v. Executive Office of the President*, 587 F.Supp.2d 48 (D.D.C. 2008) (rejecting motion to dismiss claims over agency's allegedly illegal destruction and failure to preserve emails under the APA, 5 U.S.C. §§ 704-06, and the Mandamus Act, 28 U.S.C. § 1361).

<sup>27</sup> See, e.g., *Competitive Enterprise Institute v. Environmental Protection Agency*, D.D.C. civil actions ## 12-1497, 12-1617, 13-406, 13-434, 13-624, 13-779, 13-1074 (all involving FOIA requests to EPA by plaintiff).

<sup>28</sup> 40 C.F.R. § 2.106.

- 48) Regardless, plaintiff states on information and belief that EPA continues this pattern, practice and/or policy described herein.
- 49) Further, it is a violation of the U.S. Code to willfully and unlawfully conceal, remove, mutilate, obliterate, or destroy any record, proceeding, paper, document, or other thing, filed or deposited with any clerk or officer of any court of the United States, or in any public office, or with any public officer of the United States, or attempt or act with intent to do so.<sup>29</sup>
- 50) As a regular FOIA requester, CEI will continue to experience ongoing harm in the form of lost information and destruction of the documents it seeks unless this court declares EPA's policy of not preserving text messages illegal and puts an end to it.
- 51) EPA has not disavowed or repudiated its position justifying the destruction of such agency documents. EPA has instead defended the practice as appropriate, and efforts to compel the Agency to cease the practice as intrusive. It clearly intends to apply this objectionable position in future FOIA requests by plaintiff. It is therefore evident that the impermissible practice is a continuing one, that plaintiff will experience a continuing injury due to this practice, and that no relief is forthcoming.<sup>30</sup>
- 52) "The case is fit for review because it presents a clear-cut legal question," whether EPA's document preservation policy regarding text messages is "inconsistent" with federal record management laws such as the Federal Records Act and FOIA.<sup>31</sup>
- 53) This Court should issue a declaratory judgment that EPA has violated its duty to preserve records under the Federal Records Act and FOIA; has acted arbitrarily, capriciously, and illegally in violation of the APA; and that it has a duty to preserve, and prevent the destruction by EPA employees, of text messages transmitted on EPA devices.

---

<sup>29</sup> 18 USC § 2071 - Concealment, removal, or mutilation generally.

<sup>30</sup> See *Better Gov't Ass'n v. Dept. of State*, 780 F.2d 86, 90-92 (D.C. Cir. 1992).

<sup>31</sup> See *Venetian Casino Resort LLC v. EEOC*, 409 F.3d 359, 365 (D.C. Cir. 2005).

54) EPA should also be required to disclose how it came to design and implement a system whereby absolutely no record of this class of correspondence is preserved. EPA has failed to preserve not only the text messages, but also all metadata about them. For example, according to EPA, it is aware that its arrangement with its telephone carrier no longer preserves the telephone numbers to which text messages were sent or from where they were received.<sup>32</sup> This makes it impossible to cross-check an official's, *e.g.*, McCarthy's, claims that each and every among the thousands of text messages on her EPA phone were all personal and not one was work-related. EPA should also be required to reveal just how this system of record destruction operates, and who was responsible for putting it in place.

### **SECOND CLAIM FOR RELIEF**

#### **Duty to Preserve and Not Destroy Text Messages – Injunctive Relief**

55) Plaintiff re-alleges paragraphs 1-54 as if fully set out herein

56) EPA will continue its unlawful policy of destroying and not preserving text messages unless it is enjoined from so doing, even though that policy violates the Federal Records Act, destroys documents subject to FOIA, and is arbitrary and capricious agency action violative of the Administrative Procedure Act. "In utilizing its equitable powers to enforce the provisions of the FOIA, the district court may consider injunctive relief where appropriate ...

---

<sup>32</sup> See Email from DoJ counsel for EPA Mark Nebeker to Chris Horner, counsel for CEI, copying Cindy Anderson of EPA OGC, at 9/12/2013 1:54 PM (admitting that "Although phone calls are delineated by each number called and the airtime and charges, that is not true for text messages. It is my understanding the Agency does not receive a record from Verizon (or, in this case, its predecessor, AT&T) of individual text messages made by its employees, including Ms. McCarthy. ") This involved FOIA request HQ-2013-006937 and *Competitive Enterprise Institute v. Environmental Protection Agency*, D.D.C. Civil Action No. 13-1074, seeking McCarthy's text-message metadata information from phone bills, which is also being destroyed. In a subsequent email Ms. Anderson asserted that with AT&T, a very limited amount of metadata had been preserved, from April 2011 to November 2011. See Email from Cindy Anderson of EPA to Chris Horner, September 17, 2013 9:17 AM.



to bar future violations that are likely to occur.”<sup>33</sup> Courts have previously found that injunctive relief is necessary to prevent EPA from deleting or destroying documents subject to FOIA.<sup>34</sup>

57) Thus, CEI is entitled to injunctive relief forbidding EPA to destroy and/or not preserve text messages.

58) In addition, CEI is entitled to preliminary injunctive relief forbidding such practices, because the destruction and failure to preserve documents results in irreparable harm by forever eliminating access to those documents, and because there is a strong public interest in ensuring an agency’s compliance with federal record management laws such as the Federal Records Act and FOIA,<sup>35</sup> and with regulations commanding that records not “be disposed of while they are the subject of a pending . . . lawsuit under the FOIA.”<sup>36</sup>

59) This Court should enter an injunction ordering EPA to preserve, and prevent the destruction by EPA employees, of text messages transmitted on EPA devices; and to establish safeguards against their removal and loss.

---

<sup>33</sup> See *Long v. United States Internal Revenue Service*, 693 F.2d 907, 909 (9th Cir.1982).

<sup>34</sup> See, e.g., *Union Pac. R.R. Co. v. U.S. Env’tl. Prot. Agency*, 2010 WL 2560455 (D. Neb. June 24, 2010) (granting temporary restraining order in light of evidence that “the EPA has engaged in a practice of deleting relevant emails in response to Union Pacific’s FOIA request”; emails indicated EPA official instructed employees to destroy documents and delete emails relevant to company’s FOIA request); *Union Pac. R.R. Co. v. EPA*, 2010 WL 3455240 (D. Neb. Aug. 26, 2010) (granting preliminary injunction against EPA).

<sup>35</sup> See *EPIC v. Department of Justice*, 416 F.Supp.2d 30, 40-42 (D.D.C. 2006) (granting preliminary injunction to expedite response to FOIA request, because even delay in producing documents is irreparable harm; and noting that there is a strong public interest in enforcing compliance with federal laws such as FOIA) (“there is an overriding public interest ... in the general importance of an agency’s faithful adherence to its statutory mandate.”), quoting *Jacksonville Port Auth. v. Adams.*, 556 F.2d 52, 59 (D.C.Cir.1977); *Union Pac. R.R. Co. v. U.S. Env’tl. Prot. Agency*, 2010 WL 2560455 (D. Neb. June 24, 2010) (granting temporary restraining order against EPA, enjoining the EPA and its employees from deleting or destroying emails in violation of FOIA, and finding “irreparable harm” from EPA’s “pattern of deleting relevant emails”).

<sup>36</sup> 40 C.F.R. § 2.106.

### **THIRD CLAIM FOR RELIEF**

#### **Duty to Preserve and Not Destroy Text Messages – Writ of Mandamus**

- 60) Plaintiff re-alleges paragraphs 1-59 as if fully set out herein.
- 61) Plaintiff has a clear right to relief under laws such as the Federal Records Act; the defendant has a clear duty to act; and there is no other adequate remedy available to plaintiff.
- 62) CEI has a clear statutory right to the records that it seeks, EPA has not fulfilled its clear statutory obligations to preserve and provide such records, and there is no legal basis for destroying them.
- 63) Thus, this destruction of documents justifies the grant of a writ of mandamus or other extraordinary relief, and gives rise to a remedy under the Mandamus Act, 28 U.S.C. 1361.<sup>37</sup> Accordingly, this court should issue a writ of mandamus.

### **FOURTH CLAIM FOR RELIEF**

#### **Duty to Notify the Archivist of the United States - Injunctive Relief**

- 64) Plaintiff re-alleges paragraphs 1-63 as if fully set out herein.
- 65) The deletion by the EPA Administrator and Assistant Administrator of all text messages, including texts that were substantively similar to emails that were preserved and produced as records under FOIA, caused the destruction of federal records.
- 66) The head of any Federal agency has an obligation to notify the Archivist of the United States whenever “any actual, impending, or threatened unlawful removal, defacing, alteration, or destruction of records in the custody of the agency of which he is the head come[s] to his attention”<sup>38</sup>

---

<sup>37</sup> See *CREW v. Executive Office of the President*, 587 F.Supp.2d 48 (D.D.C. 2008) (agency’s destruction of numerous emails gave rise to mandamus claim).

<sup>38</sup> 44 U.S.C.A. § 3106

- 67) The Administrator of the EPA had actual knowledge of the destruction of the federal records in the form of text messages, since the previous and current Administrator both directed and carried out the deletion of those records.
- 68) The knowledge on the part of the Administrator triggered the obligation under 44 U.S.C.A. § 3106 to notify the Archivist of the United States and the Attorney General, in order to recover those records destroyed.
- 69) Neither Administrator McCarthy nor Administrator Jackson ever notified the Archivist or the Attorney General regarding the destruction of the federal records.
- 70) The failure by the Administrator to take remedial action and to notify the Archivist or the Attorney General of the destruction of the documents despite clear statutory mandates is actionable under the APA.<sup>39</sup>
- 71) When the Administrator of a Federal agency fails to take action in compliance with the obligation of 44 U.S.C.A. § 3106, plaintiff has a right to seek to compel such compliance.<sup>40</sup>
- 72) Thus this Court should order the Administrator of the EPA to notify the Archivist of the United States, and the Attorney General about the destruction of federal records carried out by the Administrator and to assist the Attorney General in initiating an enforcement action.

**FIFTH CLAIM FOR RELIEF**  
**Costs And Fees – Injunctive Relief**

- 73) Plaintiff re-alleges paragraphs 1-72 as if fully set out herein.

---

<sup>39</sup> See *Armstrong v. Bush*, 924 F.2d 282, 295 (D.C. Cir. 1991) (“the FRA *requires* the agency head and Archivist to take enforcement action” in response to destruction of records; “On the basis of such clear statutory language mandating that the agency head and Archivist seek redress for the unlawful removal or destruction of records, we hold that the agency head's and Archivist's enforcement actions are subject to judicial review.”).

<sup>40</sup> See *Id.*

- 74) Pursuant to 5 U.S.C. § 552(a)(4)(E), the Court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.
- 75) Pursuant to 28 U.S.C. § 2412, this Court may award fees against the United States where its position was not substantially justified. Here, EPA's position contradicts federal record-keeping and other laws, and is not substantially justified.
- 76) This Court should enter an injunction ordering the defendant to pay reasonable attorney fees and other litigation costs reasonably incurred in this case.

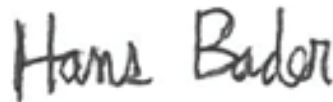
WHEREFORE, Plaintiff requests the declaratory and injunctive relief herein sought, and an award for its attorney fees and costs and such other and further relief as the Court shall deem proper.

Respectfully submitted this 10th day of February, 2014,



Christopher C. Horner  
D.C. Bar No. 440107  
1899 L Street, NW, 12<sup>th</sup> Floor  
Washington, D.C. 20036  
(202) 262-4458  
[chris.horner@cei.org](mailto:chris.horner@cei.org)

\*



Hans Bader, D.C. Bar No. 466545  
Sam Kazman, D.C. Bar No. 946376  
Competitive Enterprise Institute  
1899 L St., N.W., 12<sup>th</sup> Floor  
Washington, D.C. 20036  
(202) 331-2278, [hbader@cei.org](mailto:hbader@cei.org)  
Attorneys for Plaintiff

**From:** [Minoli, Kevin](#)  
**To:** [Garbow, Avi](#)  
**Subject:** FW: CEI v. EPA, 13-0779 (BAH)  
**Date:** Friday, August 02, 2013 2:01:00 PM

---

Kevin S. Minoli  
Acting Principal Deputy General Counsel  
Office of General Counsel  
Main Office Line: 202-564-8064  
Direct Dial: 202-564-5551

---

**From:** Kelly, Lynn  
**Sent:** Friday, August 02, 2013 1:14 PM  
**To:** Minoli, Kevin  
**Cc:** Miller, Kevin  
**Subject:** FW: CEI v. EPA, 13-0779 (BAH)

Kevin,

Here was Nancy's response. (b) (5) DPP, (b) (5) ACP, (b) (5) AWP

[REDACTED]

Lynn Kelly | US EPA | Office of General Counsel | 1200 Pennsylvania Ave., NW | ARN, Mail Code 2377A  
| Washington DC 20460 | phone: (202) 564-3266

The contents of this e-mail and any attachments to it may contain deliberative-process, attorney-client, attorney work product, or otherwise privileged material. If you are not the intended recipient, or believe you have received this communication in error, please delete the copy you received, and do not print, copy, retransmit, disseminate, or otherwise use the information. Thank you.

---

**From:** Ketcham-Colwill, Nancy  
**Sent:** Friday, August 02, 2013 1:07 PM  
**To:** Kelly, Lynn  
**Cc:** Miller, Kevin  
**Subject:** RE: CEI v. EPA, 13-0779 (BAH)

(b) (5) DPP, (b) (5) ACP

[REDACTED]

[REDACTED]

(b) (5) DPP, (b) (5) ACP

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

---

**From:** Kelly, Lynn  
**Sent:** Friday, August 02, 2013 10:34 AM  
**To:** Ketcham-Colwill, Nancy  
**Cc:** Miller, Kevin  
**Subject:** FW: CEI v. EPA, 13-0779 (BAH)

Nancy,

Kevin left you a voicemail a few minutes ago related to this email.

(b) (5) DPP, (b) (5) ACP, (b) (5) AWP

[REDACTED]


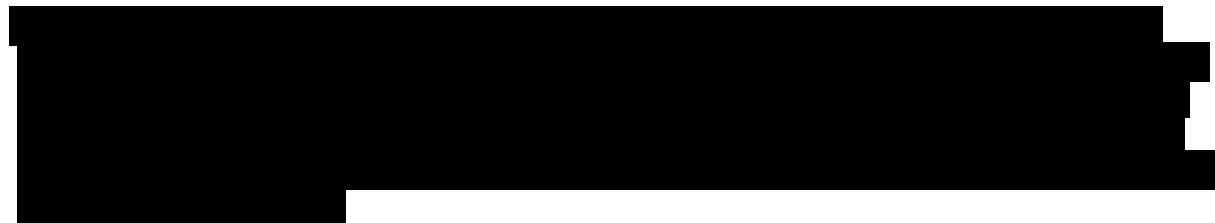
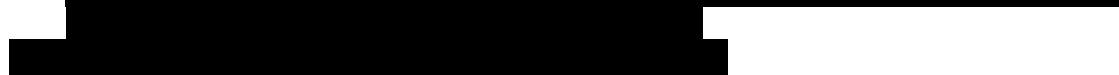
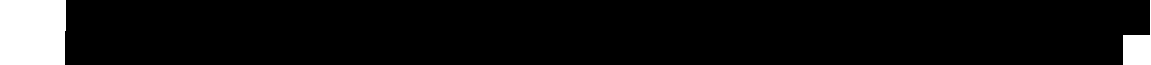
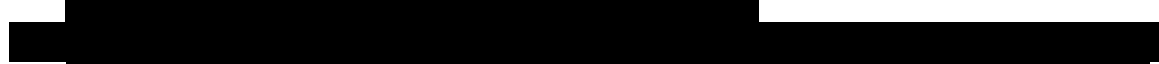



[REDACTED]

[REDACTED]

As a reminder, our last statements we sent to them was:

**The Agency did not locate any text messages responsive to your FOIA request at issue in this case. Moreover and in any event, Ms. McCarthy uses text messaging to communicate with her family. Ms. McCarthy uses email for government business, and text messaging for family and other personal business. These personal text messages are unrelated to Agency business, and thus were not required to be preserved by the Agency.”**

(b) (5) DPP, (b) (5) ACP, (b) (5) AWP



Thanks,

Lynn Kelly | US EPA | Office of General Counsel | 1200 Pennsylvania Ave., NW | ARN, Mail Code 2377A  
| Washington DC 20460 | phone: (202) 564-3266

The contents of this e-mail and any attachments to it may contain deliberative-process, attorney-client, attorney work product, or otherwise privileged material. If you are not the intended recipient, or believe you have received this communication in error, please delete the copy you received, and do not print, copy, retransmit, disseminate, or otherwise use the information. Thank you.

---

**From:** Lo, Michelle (USADC) [<mailto:Michelle.Lo2@usdoj.gov>]

**Sent:** Friday, August 02, 2013 9:36 AM

**To:** Kelly, Lynn

**Subject:** FW: CEI v. EPA, 13-0779 (BAH)

**From:** [chornerlaw@aol.com](mailto:chornerlaw@aol.com) [<mailto:chornerlaw@aol.com>]  
**Sent:** Thursday, August 01, 2013 10:05 PM  
**To:** Lo, Michelle (USADC); [hbader@cei.org](mailto:hbader@cei.org)  
**Cc:** [skazman@cei.org](mailto:skazman@cei.org)  
**Subject:** RE: CEI v. EPA, 13-0779 (BAH)

Dear Michelle,

Rather than endless rounds of clarification, though we have only sought one clear statement, I \*think\* you may just clarified the ambiguity as explained below. But if you plainly state what is implied we can dismiss.

Below you more strongly imply what seemed the implication before, but is still not stated outright with no room for misunderstanding. **That is that Ms. McCarthy \*only\* used the texting function on her EPA phone for personal messages; and because she never used it for work this is why EPA has preserved none of her texts.**

If that is what you were saying, would you please confirm that and that this is also EPA's position. In that case, you need not take any further questions to EPA and I accept the 'no records' response as sufficient such that we will dismiss.

I look forward to your reply.

Best,  
Chris

Sent from my Verizon Wireless 4G LTE smartphone

"Lo, Michelle (USADC)" wrote:

Chris,

I will take your request back to the agency, but I would like to be clear in what I will be communicating to the agency. The Agency has already explained that Ms. McCarthy uses text messaging for family and other personal business, not government business and that, because personal text messages are unrelated to Agency business, they were not required to be preserved by the Agency. I am not sure how you read this statement to mean that Ms. McCarthy uses the texting function for EPA business. As I explained to Hans, this FOIA request deals with text messages on 18 specific dates, and we have already provided a very clear explanation for the "no records" response.

If what you are asking is – did Ms. McCarthy send ever any text messages that were work-related – I can ask the EPA if it would be willing to respond to this question even though it is well outside the scope of the FOIA request and does not alter the fact that the EPA did not locate any text messages on the 18 specific dates. If the EPA is willing to respond to the question of whether Ms. McCarthy ever sent any text messages that were work-related, can you represent that you will dismiss this



case? As much as I think briefing would be an unnecessary use of the Court's and the parties' resources, it may be that we end up having to brief this matter rather than engage in endless rounds of clarification.

Best,  
Michelle

**From:** Chris Horner [<mailto:chornerlaw@aol.com>]  
**Sent:** Thursday, August 01, 2013 6:41 PM  
**To:** [HBader@cei.org](mailto:HBader@cei.org); Lo, Michelle (USADC)  
**Cc:** [SKazman@cei.org](mailto:SKazman@cei.org)  
**Subject:** Re: CEI v. EPA, 13-0779 (BAH)

Dera Michelle,

Please consider the following, in addition to what Hans has written you.

EPA's obligation is to *demonstrate* 'no records'. So far they have stated it. Demonstration is found in the bills for her device.

We have obtained what EPA claims to be the relevant (texting) portions of those bills, showing extensive texting activity, so extensive that it is thoroughly implausible that Ms. McCarthy didn't text on those dates.

After we calculated the probability (1 in 7.9 sextillion), we received your statement on EPA's behalf including the portion that is the basis for the ambiguity that Hans refers to and under which we cannot dismiss, but possibly can if you clarify what it is saying:

Ms. McCarthy uses text messaging to communicate with her family. Ms. McCarthy uses email for government business, and text messaging for family and other personal business. These personal text messages are unrelated to Agency business, and thus were not required to be preserved by the Agency.

To me this plainly implied that EPA's position is that Ms. McCarthy uses email for work and the text messaging function *only* for personal messages, and therefore EPA has not preserved her text messaging. If that is the case, and EPA state it, then the 'no records' response is sufficient and we can, I believe, dismiss.

However, another of us suggested that in context it implies something materially different, that while Ms. McCarthy uses the texting function for EPA business, on the 18 dates at issue in this matter all texts sent or received by Ms. McCarthy were personal, which is why those specific text messages are not preserved. We have not had our stats people run the probability of that but I suggest it is for all practical purposes the same as the idea that she did not text on those 18 dates.

Regardless, it may imply both but we cannot reasonably discern which, and so we ask you to state which is EPA's assertion. This is material because of EPA's obligation to demonstrate, and the sole (and most reasonable) demonstration -- her phone bills -- indicating that one of these readings is implausible, and under that reading therefore so is the 'no records' claim. The other reading is more plausible and makes the 'no records' response plausible.

So, we simply would like clarification of the ambiguous statement: over the period in question, did EPA preserve some of Ms. McCarthy's text messages -- those that someone determined were work-related -- or did they preserve none of them because they were all personal?

If we have a clear answer to this then depending on that clarification we can possibly dismiss, or we know we cannot justify doing so. We also cannot justify doing so in the absence of a clarification of an ambiguous assertion. Clarifying it is of course much simpler than further litigating this if that clarification would enable resolution and dismissal.

But as such, we need it to be a formal representation, in writing.

We look forward to your response.

Best,  
Chris Horner

\*\*\*\*\*

The information contained in this message may be privileged. This transmission is therefore intended by the sender to be confidential and intended only for the proper recipient. If you are not the intended recipient distribution of this message is prohibited.

-----Original Message-----

From: Hans Bader <[HBader@cei.org](mailto:HBader@cei.org)>  
To: Lo, Michelle (USADC) (USADC) <[Michelle.Lo2@usdoj.gov](mailto:Michelle.Lo2@usdoj.gov)>  
Cc: Sam Kazman <[SKazman@cei.org](mailto:SKazman@cei.org)>; Chris Horner <[chornerlaw@aol.com](mailto:chornerlaw@aol.com)>  
Sent: Thu, Aug 1, 2013 11:30 am  
Subject: RE: CEI v. EPA, 13-0779 (BAH)

I should note that we have no objection to the proposed briefing schedule you suggested

(EPA's Motion for Summary Judgment  
CEI's Opposition to EPA's Motion for Summary Judgment  
EPA's Reply  
2013).

September 16, 2013  
October 16, 2013  
November 6,

But, hopefully, we can tie up the loose ends described below in my earlier email, and moot the need for any summary judgment motion (by resolving the case before then).

I will call you in a few minutes to try to get these things squared away.

Thanks,

Hans Bader  
CEI

---

**From:** Hans Bader  
**Sent:** Wednesday, July 31, 2013 8:25 PM  
**To:** 'Lo, Michelle (USADC)'  
**Cc:** Sam Kazman; Chris Horner  
**Subject:** RE: CEI v. EPA, 13-0779 (BAH)

You are correct that I am only seeking the text messages for 18 specific dates, not the text messages in general. The reason I am asking about the text messages not being preserved in general over that period (July 9, 2009 to June 29, 2012) is just to confirm the apparent reason why the text messages don't exist for those 18 dates. Once this is understood, the query makes sense, to clarify matters and eliminate any ambiguities.

Thanks,

Hans

---

**From:** Lo, Michelle (USADC) [<mailto:Michelle.Lo2@usdoj.gov>]  
**Sent:** Wednesday, July 31, 2013 6:19 PM

**To:** Hans Bader  
**Cc:** Sam Kazman; Chris Horner  
**Subject:** RE: CEI v. EPA, 13-0779 (BAH)

Dear Hans,

As I stated below and as reflected in the EPA's answer to the complaint, the Agency did not locate any text messages for the 18 dates specified by your FOIA request. As for your question about the preservation of Ms. McCarthy's text messages in general, we are now going well beyond the scope of this FOIA litigation, and I do not believe this is the appropriate forum to address this question.

Thanks,  
Michelle

---

**From:** Hans Bader [<mailto:HBader@cei.org>]  
**Sent:** Wednesday, July 31, 2013 4:08 PM  
**To:** Lo, Michelle (USADC)  
**Cc:** Sam Kazman; Chris Horner  
**Subject:** RE: CEI v. EPA, 13-0779 (BAH)

Thanks for the clarifying details. Does this mean that her text messages in general weren't preserved, or just that the agency didn't locate any such messages for the 18 dates specified by the FOIA request? (Just tying up loose ends.)

Thanks,

Hans

---

**From:** Lo, Michelle (USADC) [<mailto:Michelle.Lo2@usdoj.gov>]  
**Sent:** Wednesday, July 31, 2013 3:42 PM  
**To:** Hans Bader  
**Cc:** Sam Kazman; Chris Horner  
**Subject:** RE: CEI v. EPA, 13-0779 (BAH)

Dear Hans,

Thank you for the call just now. To summarize our discussion, I've inquired with the EPA about your question below, and EPA has explained that the Agency did not locate any text messages responsive to your FOIA request at issue in this case. Moreover and in any event, Ms. McCarthy uses text messaging to communicate with her family. Ms. McCarthy uses email for government business, and text messaging for family and other personal business. These personal text messages are unrelated to Agency business, and thus were not required to be preserved by the Agency.

It's my understanding that you will be filing a stipulation of dismissal in this case. I do have one edit, which is to add "with each party to bear its own costs and fees" to the end of the stipulation. I have also made a formatting change to the signature block since my telephone number is changing. If these changes are acceptable to you, you are authorized to file the stipulation on behalf of the parties.

Thanks,  
Michelle

Michelle Lo  
Assistant United States Attorney  
Civil Division  
555 4th Street, N.W.  
Washington, D.C. 20530

(202) 252-2541 – **Please note new number**  
(202) 514-8780 fax  
[Michelle.Lo2@usdoj.gov](mailto:Michelle.Lo2@usdoj.gov)

---

**From:** Hans Bader [<mailto:HBader@cei.org>]  
**Sent:** Monday, July 29, 2013 3:02 PM  
**To:** Lo, Michelle (USADC)  
**Cc:** Sam Kazman; Chris Horner  
**Subject:** RE: CEI v. EPA, 13-0779 (BAH)

One final thing: My colleagues are curious and want an answer to the following question before we dismiss the case: How can there be no responsive records (as stated by EPA in its no-records response, and echoed in the answer), that is, no text messages, when EPA has elsewhere produced documents to us saying that Ms. McCarthy sent hundreds of text messages using her EPA device (see the attached administrative response by EPA to Chris Horner's FOIA request – the first attached file is EPA's cover letter in response to that request, and the second is its substantive response)? I'd like to get that clarification on that issue before filing the stipulation I sent earlier.

Thanks,

Hans Bader  
CEI

---

**From:** Hans Bader  
**Sent:** Monday, July 29, 2013 12:17 PM  
**To:** 'Lo, Michelle (USADC)'  
**Cc:** Sam Kazman  
**Subject:** RE: CEI v. EPA, 13-0779 (BAH)

Oops. The draft stipulation I sent in the below email had the wrong docket number on it. That has been fixed in the attached draft stipulation.

---

**From:** Hans Bader  
**Sent:** Monday, July 29, 2013 12:11 PM  
**To:** 'Lo, Michelle (USADC)'  
**Cc:** Sam Kazman  
**Subject:** RE: CEI v. EPA, 13-0779 (BAH)

Chris Horner remains very skeptical of the no-records response. Nevertheless, it seems to me that it may not be worth the candle to keep litigating this particular case, as a prudential matter.

Accordingly, plaintiff would be willing to file the attached stipulation of dismissal. If this is acceptable to you, then it can be filed with the court, and it will not be necessary to set a briefing schedule.

Sorry for the delay in responding.

Thank you.

Hans Bader  
Competitive Enterprise Institute  
(202) 331-2278  
[hbader@cei.org](mailto:hbader@cei.org)

---

**From:** Lo, Michelle (USADC) [<mailto:Michelle.Lo2@usdoj.gov>]

**Sent:** Monday, July 29, 2013 10:11 AM  
**To:** Hans Bader  
**Subject:** RE: CEI v. EPA, 13-0779 (BAH)

Dear Hans:

Per Judge Howell's Standing Order, the parties are to jointly prepare and submit a report indicating whether the agency has made a final determination on compliance with the FOIA request at issue and propose a schedule for the filing of dispositive motions within 14 days after any defendant appears, or by this Friday, August 2. As you know, the EPA issued a "no records" response to CEI's FOIA request on May 31, 2013. Provided CEI intends to proceed with this litigation, we propose the following briefing schedule:

|                                                       |                    |
|-------------------------------------------------------|--------------------|
| EPA's Motion for Summary Judgment                     | September 16, 2013 |
| CEI's Opposition to EPA's Motion for Summary Judgment | October 16, 2013   |
| EPA's Reply                                           | November 6, 2013   |

Please let me know if the above proposal is agreeable to you. Thank you.

Michelle Lo  
Assistant United States Attorney  
Civil Division  
555 4th Street, N.W.  
Washington, D.C. 20530  
(202) 252-2541 – **Please note new number**  
(202) 514-8780 fax  
[Michelle.Lo2@usdoj.gov](mailto:Michelle.Lo2@usdoj.gov)

---

**From:** Hans Bader [<mailto:HBader@cei.org>]  
**Sent:** Wednesday, July 17, 2013 6:06 PM  
**To:** Lo, Michelle (USADC)  
**Subject:** RE: CEI v. EPA, 13-0779 (BAH)

I am still waiting to hear back. Sorry about the delay.

---

**From:** Lo, Michelle (USADC) [<mailto:Michelle.Lo2@usdoj.gov>]  
**Sent:** Wednesday, July 17, 2013 6:00 PM  
**To:** Hans Bader  
**Subject:** RE: CEI v. EPA, 13-0779 (BAH)

Hans:

Have you had a chance to discuss with your colleagues whether CEI intends to move forward with this litigation in light of the EPA's no records response?

Thanks,  
Michelle

---

**From:** Lo, Michelle (USADC)  
**Sent:** Thursday, July 11, 2013 4:12 PM  
**To:** Hans Bader <[HBader@cei.org](mailto:HBader@cei.org)> ([HBader@cei.org](mailto:HBader@cei.org))  
**Subject:** CEI v. EPA, 13-0779 (BAH)

Hans:

Attached is the EPA's response to CEI's FOIA request for "copies of all text messages sent by Assistant Administrator for Air and Radiation Gina McCarthy on a mobile telephone provided for her use by the Agency" that I was referring to on our call just now. Please let me know if CEI believes that further litigation of this case will be necessary in light of the EPA's no records response. Thank you.

<< File: Final Response 6005.pdf >>

Michelle Lo  
Assistant United States Attorney  
Civil Division  
555 4th Street, N.W.  
Washington, D.C. 20530  
(202) 514-5134; (202) 514-8780 fax  
[Michelle.Lo2@usdoj.gov](mailto:Michelle.Lo2@usdoj.gov)

**From:** [Weinstock, Larry](#)  
**To:** [Minoli, Kevin](#); [Miller, Kevin](#); [Ketcham-Colwill, Nancy](#)  
**Cc:** [McDermott, Marna](#)  
**Subject:** FW: Detailed Billing for Gina McCarthy  
**Date:** Thursday, June 27, 2013 3:26:24 PM  
**Attachments:** [202-596-0247 - Message Events Count - Jul 09-Jun 12.xlsx](#)

---

(b) (5) DPP

(b) (5) DPP

Larry

-----Original Message-----

**From:** Reilly, Tom  
**Sent:** Thursday, June 27, 2013 3:13 PM  
**To:** Weinstock, Larry  
**Subject:** FW: Detailed Billing for Gina McCarthy

Larry,

My apologies - I have been tied up with FY14 budget schedules that we had to file this week - (b) (5) DPP

Tom

-----Original Message-----

**From:** DAVIS, TANIKA  
**Sent:** Tuesday, June 25, 2013 1:26 PM  
**To:** Reilly, Tom; Clark, Dee; Grantham, Jessica  
**Cc:** Aydlett, Dwayne; Lanier, Lynsey; Beaver, William  
**Subject:** RE: Detailed Billing for Gina McCarthy

Tom,

(b) (5) DPP

Please let me know if you have any questions.

Thanks,

Tanika Davis  
ECS Team - EPA ITS - ACT II Contractor  
Sr. Telecommunications Billing Analyst  
Information Management Group/Mobile Devices Business Office  
Tel: (919) 541-1823  
Fax: (919) 685-3118  
Email: [davis.tanika@epa.gov](mailto:davis.tanika@epa.gov)

~~~~~  
\*\*\*PLEASE NOTE\*\*\* If you require Mobile Device related assistance, please use the following contacts:  
EZTech Locations - EPA Call Center 866-411-4372 (option 3) or [EZTech@epa.gov](mailto:EZTech@epa.gov) All Other Locations - EPA Call Center at 866-411-4EPA or [EPACALLCENTER@epa.gov](mailto:EPACALLCENTER@epa.gov)

Act mindfully. Accept entirely. Move strongly. Think softly. Speak beautifully. Live simply. Love completely.

-----Original Message-----

From: Reilly, Tom  
Sent: Tuesday, June 11, 2013 3:34 PM  
To: DAVIS, TANIKA; Clark, Dee; Grantham, Jessica  
Cc: Aydlett, Dwayne; Lanier, Lynsey; Beaver, William  
Subject: RE: Detailed Billing for Gina McCarthy

Tanika,

Thanks for the information - (b) (5) DPP ?

Tom

-----Original Message-----

From: DAVIS, TANIKA  
Sent: Tuesday, June 11, 2013 3:26 PM  
To: Reilly, Tom; Clark, Dee; Grantham, Jessica  
Cc: Aydlett, Dwayne; Lanier, Lynsey; Beaver, William  
Subject: RE: Detailed Billing for Gina McCarthy

Hello Everyone,

(b) (5) DPP

Please let me know if you have any questions.

Thanks,

Tanika Davis  
ECS Team - EPA ITS - ACT II Contractor  
Sr. Telecommunications Billing Analyst  
Information Management Group/Mobile Devices Business Office  
Tel: (919) 541-1823  
Fax: (919) 685-3118  
Email: davis.tanika@epa.gov

~~~~~  
\*\*\*PLEASE NOTE\*\*\* If you require Mobile Device related assistance, please use the following contacts:  
EZTech Locations - EPA Call Center 866-411-4372 (option 3) or EZTech@epa.gov All Other Locations - EPA Call  
Center at 866-411-4EPA or EPACALLCENTER@epa.gov

Act mindfully. Accept entirely. Move strongly. Think softly. Speak beautifully. Live simply. Love completely.

-----Original Message-----

From: Reilly, Tom  
Sent: Tuesday, June 11, 2013 12:01 PM  
To: DAVIS, TANIKA; Clark, Dee; Grantham, Jessica  
Cc: Aydlett, Dwayne; Lanier, Lynsey; Beaver, William  
Subject: RE: Detailed Billing for Gina McCarthy

Thank you Tanika

-----Original Message-----

From: DAVIS, TANIKA  
Sent: Tuesday, June 11, 2013 11:59 AM  
To: Reilly, Tom; Clark, Dee; Grantham, Jessica  
Cc: Aydlett, Dwayne; Lanier, Lynsey; Beaver, William



Subject: RE: Detailed Billing for Gina McCarthy

Tom,

I was in a meeting. I am working on that now. I will send as soon as possible.

Thanks,

Tanika Davis  
ECS Team - EPA ITS - ACT II Contractor  
Sr. Telecommunications Billing Analyst  
Information Management Group/Mobile Devices Business Office  
Tel: (919) 541-1823  
Fax: (919) 685-3118  
Email: davis.tanika@epa.gov

~~~~~  
\*\*\*PLEASE NOTE\*\*\* If you require Mobile Device related assistance, please use the following contacts:  
EZTech Locations - EPA Call Center 866-411-4372 (option 3) or EZTech@epa.gov All Other Locations - EPA Call  
Center at 866-411-4EPA or EPACALLCENTER@epa.gov

Act mindfully. Accept entirely. Move strongly. Think softly. Speak beautifully. Live simply. Love completely.

-----Original Message-----

From: Reilly, Tom  
Sent: Tuesday, June 11, 2013 11:28 AM  
To: DAVIS, TANIKA; Clark, Dee; Grantham, Jessica  
Cc: Aydlett, Dwayne; Lanier, Lynsey; Beaver, William  
Subject: RE: Detailed Billing for Gina McCarthy

Tanika,

(b) (5) DPP

Tom

-----Original Message-----

From: DAVIS, TANIKA  
Sent: Monday, June 10, 2013 5:39 PM  
To: Reilly, Tom; Clark, Dee; Grantham, Jessica  
Cc: Aydlett, Dwayne; Lanier, Lynsey; Beaver, William  
Subject: RE: Detailed Billing for Gina McCarthy

Hello Everyone,

(b) (5) DPP

Thanks,

Tanika Davis  
ECS Team - EPA ITS - ACT II Contractor

Sr. Telecommunications Billing Analyst  
Information Management Group/Mobile Devices Business Office  
Tel: (919) 541-1823  
Fax: (919) 685-3118  
Email: davis.tanika@epa.gov

~~~~~  
\*\*\*PLEASE NOTE\*\*\* If you require Mobile Device related assistance, please use the following contacts:  
EZTech Locations - EPA Call Center 866-411-4372 (option 3) or EZTech@epa.gov All Other Locations - EPA Call  
Center at 866-411-4EPA or EPACALLCENTER@epa.gov

Act mindfully. Accept entirely. Move strongly. Think softly. Speak beautifully. Live simply. Love completely.

-----Original Message-----

From: Reilly, Tom  
Sent: Monday, June 10, 2013 2:02 PM  
To: DAVIS, TANIKA; Clark, Dee; Grantham, Jessica  
Cc: Aydlett, Dwayne; Lanier, Lynsey; Beaver, William  
Subject: RE: Detailed Billing for Gina McCarthy

Tanika,

Give me what you can by the end of today

Tom

-----Original Message-----

From: DAVIS, TANIKA  
Sent: Monday, June 10, 2013 2:00 PM  
To: Clark, Dee; Grantham, Jessica  
Cc: Reilly, Tom; Aydlett, Dwayne; Lanier, Lynsey; Beaver, William  
Subject: RE: Detailed Billing for Gina McCarthy

Dee,

(b) (5) DPP  
[Redacted content]

Please advise.

Thanks,

Tanika Davis  
ECS Team - EPA ITS - ACT II Contractor  
Sr. Telecommunications Billing Analyst  
Information Management Group/Mobile Devices Business Office  
Tel: (919) 541-1823  
Fax: (919) 685-3118  
Email: davis.tanika@epa.gov

~~~~~  
\*\*\*PLEASE NOTE\*\*\* If you require Mobile Device related assistance, please use the following contacts:  
EZTech Locations - EPA Call Center 866-411-4372 (option 3) or EZTech@epa.gov All Other Locations - EPA Call  
Center at 866-411-4EPA or EPACALLCENTER@epa.gov

Act mindfully. Accept entirely. Move strongly. Think softly. Speak beautifully. Live simply. Love completely.

-----Original Message-----

From: Clark, Dee  
Sent: Monday, June 10, 2013 12:45 PM  
To: DAVIS, TANIKA; Grantham, Jessica  
Cc: Reilly, Tom; Aydlett, Dwayne; Lanier, Lynsey; Beaver, William  
Subject: RE: Detailed Billing for Gina McCarthy  
Importance: High

Tanika,

(b) (5) DPP

Thanks,

Dee Clark  
WCF Service Manager for MD, YA, LD, LE, & LF ATPOC for TDD 04 & 09 (ITS-ACT II) ITIL v3 Foundation  
Level Certified U. S. EPA | OEI | OTOP | EDSD | EPA West - 6312L clark.dee@epa.gov | 202-566-0890 office |  
202-297-5756 cell

-----Original Message-----

From: DAVIS, TANIKA  
Sent: Monday, June 10, 2013 12:25 PM  
To: Clark, Dee; Grantham, Jessica  
Cc: Reilly, Tom; Aydlett, Dwayne; Lanier, Lynsey; Beaver, William  
Subject: RE: Detailed Billing for Gina McCarthy

Dee,

(b) (5) DPP

Thanks,

Tanika Davis  
ECS Team - EPA ITS - ACT II Contractor  
Sr. Telecommunications Billing Analyst  
Information Management Group/Mobile Devices Business Office  
Tel: (919) 541-1823  
Fax: (919) 685-3118  
Email: davis.tanika@epa.gov

~~~~~  
\*\*\*PLEASE NOTE\*\*\* If you require Mobile Device related assistance, please use the following contacts:  
EZTech Locations - EPA Call Center 866-411-4372 (option 3) or EZTech@epa.gov All Other Locations - EPA Call  
Center at 866-411-4EPA or EPACALLCENTER@epa.gov

Act mindfully. Accept entirely. Move strongly. Think softly. Speak beautifully. Live simply. Love completely.

-----Original Message-----

From: Clark, Dee  
Sent: Monday, June 10, 2013 11:29 AM  
To: Grantham, Jessica; DAVIS, TANIKA  
Cc: Reilly, Tom; Aydlett, Dwayne; Lanier, Lynsey; Beaver, William  
Subject: FW: Detailed Billing for Gina McCarthy

Jessica/Tanika,

Please provide the requested data today.

Thanks for your hard work on this!!!

Dee Clark  
WCF Service Manager for MD, YA, LD, LE, & LF ATPOC for TDD 04 & 09 (ITS-ACT II) ITIL v3 Foundation  
Level Certified U. S. EPA | OEI | OTOP | EDSD | EPA West - 6312L clark.dee@epa.gov | 202-566-0890 office |  
202-297-5756 cell

-----Original Message-----

From: Reilly, Tom  
Sent: Thursday, June 06, 2013 11:10 AM  
To: Clark, Dee  
Subject: FW: Detailed Billing for Gina McCarthy

Dee,

(b) (5) DPP  
[Redacted]

Tom

-----Original Message-----

From: Slade, Reginald  
Sent: Thursday, June 06, 2013 9:41 AM  
To: Reilly, Tom  
Subject: RE: Detailed Billing for Gina McCarthy

Tom,

(b) (5) DPP  
[Redacted]

Many thanks,

Reginald A. Slade  
Team Leader/Information Management Officer (IMO) Office of Air and Radiation  
202 564-1346

-----Original Message-----

From: Slade, Reginald  
Sent: Wednesday, June 05, 2013 9:35 AM  
To: Reilly, Tom

Subject: RE: Detailed Billing for Gina McCarthy

Thanks Tom!

Reginald A. Slade  
Team Leader/Information Management Officer (IMO) Office of Air and Radiation  
202 564-1346

-----Original Message-----

From: Reilly, Tom  
Sent: Wednesday, June 05, 2013 9:25 AM  
To: Slade, Reginald; Noga, Vaughn; Clark, Dee; Grantham, Jessica; DAVIS, TANIKA  
Cc: Simmons, Joseph; Lee, Maja; Aydllett, Dwayne; Beaver, William; Lanier, Lynsey; Salgado, Omayra  
Subject: RE: Detailed Billing for Gina McCarthy

Reggie,

I have the Lockheed guys pulling that for you right now

Tom

-----Original Message-----

From: Slade, Reginald  
Sent: Wednesday, June 05, 2013 9:24 AM  
To: Noga, Vaughn; Clark, Dee; Grantham, Jessica; DAVIS, TANIKA  
Cc: Simmons, Joseph; Lee, Maja; Reilly, Tom; Aydllett, Dwayne; Beaver, William; Lanier, Lynsey; Salgado, Omayra  
Subject: RE: Detailed Billing for Gina McCarthy

Vaughn,

(b) (5) DPP

Thanks.

Reginald A. Slade  
Team Leader/Information Management Officer (IMO) Office of Air and Radiation  
202 564-1346

-----Original Message-----

From: Noga, Vaughn  
Sent: Wednesday, June 05, 2013 9:22 AM  
To: Slade, Reginald; Clark, Dee; Grantham, Jessica; DAVIS, TANIKA  
Cc: Simmons, Joseph; Lee, Maja; Reilly, Tom; Aydllett, Dwayne; Beaver, William; Lanier, Lynsey; Salgado, Omayra  
Subject: RE: Detailed Billing for Gina McCarthy

Reggie,

(b) (5) DPP

?

Vaughn

-----Original Message-----

From: Slade, Reginald

Sent: Wednesday, June 05, 2013 9:19 AM

To: Noga, Vaughn; Clark, Dee; Grantham, Jessica; DAVIS, TANIKA

Cc: Simmons, Joseph; Lee, Maja; Reilly, Tom; Aydlett, Dwayne; Beaver, William; Lanier, Lynsey; Salgado, Omayra

Subject: RE: Detailed Billing for Gina McCarthy

Vaughn,

(b) (5) DPP

Many thanks,

Reginald A. Slade

Team Leader/Information Management Officer (IMO) Office of Air and Radiation

202 564-1346

-----Original Message-----

From: Noga, Vaughn

Sent: Tuesday, June 04, 2013 3:50 PM

To: Slade, Reginald; Clark, Dee; Grantham, Jessica; DAVIS, TANIKA

Cc: Simmons, Joseph; Lee, Maja; Reilly, Tom; Aydlett, Dwayne; Beaver, William; Lanier, Lynsey

Subject: Re: Detailed Billing for Gina McCarthy

Thank you.

Team - please provide an ETA for the info.

---

From: Slade, Reginald

Sent: Tuesday, June 04, 2013 12:59:28 PM

To: Noga, Vaughn; Clark, Dee; Grantham, Jessica; DAVIS, TANIKA

Cc: Simmons, Joseph; Lee, Maja; Reilly, Tom; Aydlett, Dwayne; Beaver, William; Lanier, Lynsey

Subject: RE: Detailed Billing for Gina McCarthy

Officially less than 20 working days. Since the request is for Gina, her Chief of Staff is anticipating that to mean this week, if possible.

Thanks,

Reginald A. Slade

Team Leader/Information Management Officer (IMO) Office of Air and Radiation

202 564-1346

-----Original Message-----

From: Noga, Vaughn

Sent: Tuesday, June 04, 2013 12:54 PM

To: Clark, Dee; Grantham, Jessica; DAVIS, TANIKA

Cc: Slade, Reginald; Simmons, Joseph; Lee, Maja; Reilly, Tom; Aydlett, Dwayne; Beaver, William; Lanier, Lynsey

Subject: RE: Detailed Billing for Gina McCarthy

Is there a suspense date associated with this request?

-----Original Message-----

From: Clark, Dee

Sent: Tuesday, June 04, 2013 11:38 AM

To: Grantham, Jessica; DAVIS, TANIKA

Cc: Slade, Reginald; Simmons, Joseph; Noga, Vaughn; Lee, Maja; Reilly, Tom; Aydlett, Dwayne; Beaver, William; Lanier, Lynsey

Subject: FW: Detailed Billing for Gina McCarthy

Importance: High

Jessica/Tanika,

Please provide the Call Detail Records (CDRs) requested by OAR for Gina McCarthy.

Thanks,

Dee Clark

WCF Service Manager for MD, YA, LD, LE, & LF ATPOC for TDD 04 & 09 (ITS-ACT II) ITIL v3 Foundation  
Level Certified U.S. EPA | OEI |OTOP | EDSO | EPA West - 6312L | clark.dee@epa.gov | 202-566-0890 office  
|202-297-5756 cell

---

From: Simmons, Joseph

Sent: Tuesday, June 04, 2013 9:57 AM

To: EPA Call Center with questions

Cc: Clark, Dee; Slade, Reginald

Subject: Detailed Billing for Gina McCarthy

This message is to request detailed billing for Gina McCarthy's mobile devices for the dates of July 1, 2009 to June 30, 2012. The devices are:

1. AT&T Torch - phone number (b) (6)
2. Verizon Cell Phone - phone number (b) (6)

This request is in response to a FOIA request from Congress. Feel free to contact me if you have any questions or concerns.

Thanks

Joseph

OAR/OPMO

202-564-1296

**From:** [Newton, Jonathan](#)  
**To:** [Weinstock, Larry](#); [Anderson, Cindy](#)  
**Cc:** [Miller, Kevin](#); [Minoli, Kevin](#); [Wachter, Eric](#); [McDermott, Marna](#)  
**Subject:** FW: HQ-2014-0002006 - Reassignment to OAR  
**Date:** Monday, January 06, 2014 4:48:03 PM  
**Attachments:** [HQ-2014-002006 Request Letter.pdf](#)

---

FYI

Jonathan V. Newton, Attorney-Advisor  
U.S. EPA, Office of the Executive Secretariat  
1200 Pennsylvania Avenue, NW (MC 1105A)  
Washington, D.C. 20460  
(202) 566-1981

---

**From:** Newton, Jonathan  
**Sent:** Friday, December 27, 2013 1:59 PM  
**To:** Lewis, Monica; Hamilton, Sabrina  
**Cc:** Gottesman, Larry  
**Subject:** HQ-2014-0002006 - Reassignment to OAR

Hi Monica and Sabrina,

This is a request seeking text messages from twelve individuals: Joe Goffman (OAR); Janet McCabe (OAR); Margo Oge (OAR); Cindy Huang (OAR); Steve Page (OAR); Peter Tsirigotis (OAR); Mike Flynn (OAR); Curt Spalding (R1); Nancy Grantham (R1); Bob Perciasepe (AO); Scott Fulton (Formerly OGC); and Ira W. Leighton (Formerly R1).

(b) (5) DPP, (b) (5) ACP

[REDACTED]

[REDACTED]

[REDACTED]

Thanks

Jonathan V. Newton, Attorney-Advisor  
U.S. EPA, Office of the Executive Secretariat  
1200 Pennsylvania Avenue, NW (MC 1105A)  
Washington, D.C. 20460  
(202) 566-1981





FOIA Request for Agency Records: Certain EPA Officials' Text Messages

Christopher Horner

to:

FOIA HQ

12/17/2013 06:29 PM

Hide Details

From: Christopher Horner <chris.horner@cei.org>

To: FOIA HQ@EPA

1 Attachment



CEI EPA MultiEmployee Text Message FOIA I.pdf

To EPA's FOIA Office,

Please see the above-styled request attached in PDF format.

Best,

Chris Horner

202.262.4458



**REQUEST UNDER THE FREEDOM OF INFORMATION ACT**

December 17, 2013

National Freedom of Information Office  
U.S. EPA  
FOIA and Privacy Branch  
1200 Pennsylvania Avenue, N.W. (2822T)  
Washington, DC 20460

**RE: FOIA Request for Agency Records: Certain EPA Officials' Text Messages**

**BY ELECTRONIC MAIL:** [hq.foia@epa.gov](mailto:hq.foia@epa.gov)

To EPA's National Freedom of Information Officer,

On behalf of the Competitive Enterprise Institute (CEI), please consider this request pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.* CEI is a non-profit public policy institute organized under section 501(c)3 of the tax code and with research, investigative journalism and publication functions, as well as a transparency initiative seeking public records relating to environmental and energy policy and how policymakers use public resources, all of which include broad dissemination of public information obtained under open records and freedom of information laws.

Please provide us, within twenty working days,<sup>1</sup> **copies of all text messages** sent to or from a mobile telephone/personal data assistant provided by EPA for the use of any of the a) following EPA employees,<sup>2</sup> b) during the period covering **June 1, 2009 to the date you process this request**, inclusive:

- 1) **Joe Goffman, Senior Counsel OAR**
- 2) **Janet McCabe**
- 3) **Margo Oge, director of the Environmental Protection Agency's office of transportation and air quality (retired late 2012)**
- 4) **3) Cindy Huang, Staff Assistant To the Assistant Administrator**
- 4) **Scott Fulton, former EPA General Counsel**
- 5) **Steve Page, Director, OAQPS, Research Triangle Park (RTP)**
- 6) **Peter Tsirigotis, Director, Sector Policies and Programs Division, OAR: OAQPS, RTP**
- 7) **Mike Flynn, Director, Office of Radiation and Indoor Air, EPA HQ**
- 8) **Bob Perciasepe**
- 9) **Curt Spalding, Regional Administrator EPA Region 1**
- 10) **Nancy Grantham, Director, EPA R1, Office of Public Affairs**
- 11) **Ira W. Leighton, former deputy RA, Region 1**

---

<sup>1</sup> See *Citizens for Responsible Ethics in Washington v. Federal Election Commission*, 711 F.3d 180, 186 (D.C. Cir. 2013), and discussion at pages 27-28, *infra*.

<sup>2</sup> To assist with identification we cite these employees' positions at some point during the period covered by this request, though several held more than one during their EPA employment, and we do not limit our request to their service in the identified positions but instead to the stated time parameters.



### **Background to this Records Request, including Public Interest**

As part of our establishing the public interest in these records please consider the following.

Text message metadata provided to us by EPA identify the above-named employees as text-message correspondents of now-Administrator Gina McCarthy on her phone/PDA provided for EPA-related correspondence. The requested records, which belong to the taxpayer and are subject to disclosure under the Freedom of Information Act,<sup>3</sup> represents basic, non-analysis but factual information reflecting correspondence activity on personal data assistants/telephones provided to federal employees solely for work-related communications, and which specific information will answer a serious, substantive outstanding question regarding Agency record preservation practices and claims made by the current EPA administrator (a requester need not demonstrate that the records would contain any particular evidence, such as of misconduct, *see Judicial Watch v. Rosotti*, 326 F. 3d 1309, 1314 (D.C. Cir. 2003)).

EPA has informed us through other proceedings that Ms. McCarthy's text message correspondence associated with her account, which under law and policy must be retained like email, was not preserved.<sup>4</sup> That is so even though the EPA-provided accounts, devices, and

---

<sup>3</sup> EPA has produced what responsive information it says it holds in response to FOIA request HQ-2013-005618, and *Competitive Enterprise Institute v. EPA*, vc: 13-1074 (D.D.C.).

<sup>4</sup> *See, e.g., Answer in Competitive Enterprise Institute v. Environmental Protection Agency*, D.D.C. No. 13-779 (filed 7/19/2013) at ¶ 8 (conceding that such texts were sent/received by EPA Assistant Administrator Gina McCarthy), ¶21 (conceding that EPA provides such officials "with personal digital assistants that have text messaging capability"), ¶¶14, 33 (EPA currently unable to locate such records); Email from Michelle Lo, counsel for EPA, to Chris Horner and Hans Bader, counsel for CEI, at 9/9/2013 3:46 PM (admitting that "Ms. McCarthy uses text messaging," but arguing that "they were not [sic] required to be preserved by the Agency."); Email from Michelle Lo, counsel for EPA, to Chris Horner and Hans Bader, counsel for CEI, at 8/1/2013 7:25 PM (conceding that "Ms. McCarthy used the texting function on her EPA phone," and that "none of her texts over the period encompassing the 18 specific dates at issue in CEI's FOIA request (July 9, 2009, to June 29, 2012) were preserved").

functions such as texting were provided them by EPA for EPA business, subject to federal law and agency equipment use and record-retention regulation and policy and disclosure laws.<sup>5</sup>

EPA and Ms. McCarthy have informed us through DoJ counsel for EPA that to the best of Ms. McCarthy's recollection all of her many thousands of text correspondence we identified that she sent or received on that device were personal, if on her EPA-provided PDA provided solely for EPA-related communications. This was by way of explaining (though as a matter of law, not excusing) destruction of the transcripts of each of these.

EPA-provided billing information for Ms. McCarthy's EPA phone/PDA containing metadata for her texting activity during the above-cited periods affirm that Ms. McCarthy's asserted (through counsel) recollection was not accurate, but that she regularly texted EPA colleagues on her EPA-provided mobile device provided solely for EPA-related correspondence.

Further illustrating CEI's continuing efforts to obtain information shedding light on the electronic correspondence and record-keeping practices we discuss herein relevant to this request, CEI first sought, then was forced to sue for, Ms. McCarty's text messages on eighteen specified dates (*see Complaint in Competitive Enterprise Institute v. United States Environmental Protection Agency*, D.D.C. Civil Action No. 13-779). At that point, EPA provided CEI with a "no records" response. EPA stated that it has been unable to locate any such texts in response to

---

<sup>5</sup> See also, e.g., Letter from Hon. David Vitter, Ranking Member, S. Comm. on Env't & Pub. Works, Hon. Darrell E. Issa, Chairman, H. Comm. on Oversight & Gov't Reform, to Hon. Lisa Jackson, Vice President of Environmental Initiatives, Apple, Inc., and former Administrator, U.S. Env'tl. Prot. Agency (August 15, 2013, [http://www.epw.senate.gov/public/index.cfm?FuseAction=Minority.PressReleases&ContentRecord\\_id=83a0e7cb-b869-e4c1-9b5e-1a2b94cf1367](http://www.epw.senate.gov/public/index.cfm?FuseAction=Minority.PressReleases&ContentRecord_id=83a0e7cb-b869-e4c1-9b5e-1a2b94cf1367)).



CEI's FOIA request.<sup>6</sup> This is even though Ms. McCarthy sent or received many thousands of such text messages such that, on the basis of information later obtained under FOIA request EPA-HQ-006937, CEI calculated the odds that Ms. McCarthy did not text on those eighteen dates as one in 7.9 sextillion.<sup>7</sup> But EPA did not preserve text messages from those eighteen dates or otherwise.<sup>8</sup> CEI dismissed the suit without prejudice in light of the claim that no responsive documents remained. *See Stipulation of Dismissal*, 9/13/2013 (docket #8).

CEI later obtained the information showing that in fact EPA was not preserving, that is was destroying, all such correspondence. Ultimately, this led to CEI again suing for relevant text/metadata agency records (see *Complaint in Competitive Enterprise Institute v. United States*

---

<sup>6</sup> See, e.g., *Answer in Competitive Enterprise Institute v. Environmental Protection Agency*, D.D.C. No. 13-779 (filed 7/19/2013) at ¶ 8 (conceding that such texts were sent by EPA Assistant Administrator Gina McCarthy), ¶21 (conceding that EPA provides such officials "with personal digital assistants that have text messaging capability"), ¶¶14, 33 (EPA currently unable to locate such records); Email from Michelle Lo, counsel for EPA, to Chris Horner and Hans Bader, counsel for CEI, at 9/9/2013 3:46 PM (admitting that "Ms. McCarthy uses text messaging," but arguing that "they were not required to be preserved by the Agency."); Email from Michelle Lo, counsel for EPA, to Chris Horner and Hans Bader, counsel for CEI, at 8/1/2013 7:25 PM (conceding that "Ms. McCarthy used the texting function on her EPA phone," and that "none of her texts over the period encompassing the 18 specific dates at issue in CEI's FOIA request (July 9, 2009, to June 29, 2012) were preserved").

<sup>7</sup> See document sent by EPA to CEI counsel attached to Aug. 20 Horner email, with PDF file bearing title "202-596-0247 - Text bill - Jul 09-June 12.pdf," produced in response to FOIA Request HQ-2013-006937 (submitted, June 3, 2013). Details are found at <http://cei.org/news-releases/odds-epa-not-destroying-gina-mccarthy-text-messages-1-79-sextillion>, including CEI's explanation of its probability estimate (<http://www.scribd.com/doc/157256436/McCarthy-Texting-Probability>).

<sup>8</sup> See, e.g., Email from Michelle Lo, counsel for EPA, to Chris Horner and Hans Bader, counsel for CEI, at 9/9/2013 3:46 PM (admitting that "Ms. McCarthy uses text messaging," if arguing that "they were not required to be preserved by the Agency."); Email from Michelle Lo, counsel for EPA, to Chris Horner and Hans Bader, counsel for CEI, at 8/1/2013 7:25 PM (conceding that "Ms. McCarthy used the texting function on her EPA phone," and that "none of her texts over the period encompassing the 18 specific dates at issue in CEI's FOIA request (July 9, 2009, to June 29, 2012) were preserved").

*Environmental Protection Agency*, D.D.C. Civil Action No. 13- 1074). Records produced in that case affirm that Ms. McCarthy did in fact use the EPA-provided phone for a purpose it was provided by the taxpayer, that is, to text numerous senior EPA officials.

For all of the above reasons and more detailed, *infra*, and with EPA having provided the identity of at least certain of Ms. McCarthy's EPA texting correspondents, we now seek these correspondents' text transcripts. These will inform us of the nature of their correspondence with Ms. McCarthy whose copies of which have been destroyed. Further, EPA's response will allow the public to learn whether EPA has been destroying text correspondence of all senior Air Office employees who EPA provided text messaging capability, or whether EPA merely allowed certain officials to destroy their own records, including Ms. McCarthy and Lisa Jackson (whose identified text correspondence EPA has also informed us it does not possess; *see* EPA's 9/18/2013 response to FOIA HQ-2013-009235).

We are interested in EPA's compliance with its legal obligation to maintain and preserve (particularly) work-related text messages sent or received on Agency devices, provided for the performance of Agency duties, as federal records and Agency records. Text messages, like the other alternative to email EPA provides its employees, instant messages, are unquestionably records,<sup>9</sup> about which there is at present no information indicating EPA manages them as federal records and/or as "records" under FOIA. Indeed, it is our understanding including by

---

<sup>9</sup> *See, e.g.*, <http://www.archives.gov/records-mgmt/initiatives/im-faq.html>, <http://www.epa.gov/records/faqs/email.htm>, and Memo to All Staff, "Transparency at EPA" by Acting Administrator Bob Perciasepe dated April 8, 2013 (*e.g.*, "Finally, the Inspector General currently is conducting an audit of the agency's records management practices and procedures. We have suggested they place focus on electronic records including email and instant messaging. While we have made progress in these areas, we are committed to addressing any concerns or weaknesses that are identified in this audit and to working collaboratively to strengthen our records management system and policies.").



information and belief, that EPA has uniformly declined or otherwise failed to produce text message transcripts or discussions in response to FOIA or congressional oversight requests for "records" or "electronic records".

There is now an additional element to this issue, with EPA's recent production in cv: 13-1074 showing that Ms. McCarthy did in fact use her EPA-provided phone for texting EPA officials, contrary to representations made to us by EPA/Ms. McCarthy through their Department of Justice counsel. CEI already has established that EPA did not preserve Lisa Jackson's text messages, in request HQ-2013-009235.

As EPA is aware this request and responsive records are directly related to a fairly high-profile and nonetheless important issue we are presently litigating with EPA, the Agency's electronic record production and preservation practices. These efforts include a recent request to enjoin the practice of systematic destruction of this class of records, an alternative to email that must be, but apparently is not being, preserved just like email (*CEI v. EPA*, D.D.C. cv: 13-1532 (RMC)).



### **EPA Owes CEL a Reasonable Search**

FOIA, as EPA makes plain, has the broadest definition of the term “records” in relevant federal recordkeeping and disclosure statutory regimes.<sup>10</sup> FOIA requires an agency to make a reasonable search of records, judged by the specific facts surrounding each request. *See, e.g., Itrurralde v. Comptroller of the Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003); *Steinberg v. DOJ*, 23 F.3d 548, 551 (D.C. Cir. 1994).

It is well-settled that Congress, through FOIA, “sought ‘to open agency action to the light of public scrutiny.’” *DOJ v. Reporters Comm. for Freedom of Press*, 498 U.S. 749, 772 (1989) (quoting *Dep’t of Air Force v. Rose*, 425 U.S. 353, 372 (1976)). The legislative history is replete with reference to the “general philosophy of full agency disclosure” that animates the statute. *Rose*, 425 U.S. at 360 (quoting S.Rep. No. 813, 89<sup>th</sup> Cong., 2<sup>nd</sup> Sess., 3 (1965)). The act is

---

<sup>10</sup> For example, EPA acknowledges on its website that “[t]he definition of a record under the Freedom of Information Act (FOIA) is broader than the definition under the Federal Records Act.” Environmental Protection Agency, “What Is a Federal Record?” <http://www.epa.gov/records/tools/toolkits/procedures/part2.htm>. See also 44 U.S.C. § 3301 (2013).

Further,

In accordance with the Federal Records Act and guidance from the D.C. Circuit, federal agencies must preserve e-mail messages if they are: “made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them.”

Letter of January 28, 2013 from Darrell Issa, Chairman, Oversight and Government Reform, and David Vitter, Ranking Member, Environment and Public Works, to James B. Martin, Administrator, Region 8, U.S. Environmental Protection Agency, at 1-2 (letter available at <http://wattsupwiththat.files.wordpress.com/2013/01/region-8-joint-letter-finalvitterissa-01292013-1.pdf>; Vitter, Issa Investigate EPA’s Transparency Problem, More Suspicious E-Mail Accounts; EPA Region 8 Administrator Violates E-Mail Rule, Uses Private E-Mail Accounts to Conduct Official Business, State News Service, January 29, 2013 (publishing text of the letter) (available in Westlaw Allnews database at 1/29/13 States News Serv. 00:00:00), citing *Armstrong v. Exec. Office of the President*, 1 F.3d 1274, 1278 (D.C. Cir. 1993).

designed to “pierce the veil of administrative secrecy and to open agency action to the light of scrutiny.” *Department of the Air Force v. Rose*, 425 U.S. 352 (1976). It is a transparency-forcing law, consistent with “the basic policy that disclosure, not secrecy, is the dominant objective of the Act.” *Id.*

A search must be “reasonably calculated to uncover all relevant documents.” *See, e.g., Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995). In determining whether or not a search is “reasonable,” courts have been mindful of the purpose of FOIA to bring about the broadest possible disclosure. *See Campbell v. DOJ*, 164 F.3d 20, 27 (D.C. Cir. 1999) (“reasonableness” is assessed “consistent with congressional intent tilting the scale in favor of disclosure”).

The reasonableness of the search activity is determined ad hoc but there are rules, including that the search must be conducted free from conflict of interest. (In searching for relevant documents, agencies have a duty “to ensure that abuse and conflicts of interest do not occur.” *Cuban v. S.E.C.*, 744 F.Supp.2d 60, 72 (D.D.C. 2010). *See also Kempker-Cloyd v. Department of Justice*, No. 97-cv-253, 1999 U.S. Dist. LEXIS 4813, at \*12, \*24 (W.D. Mich. Mar. 12, 1999) (holding that the purpose of FOIA is defeated if employees can simply assert that records are personal without agency review; faulting Department of Justice for the fact that it “was aware that employee had withheld records as ‘personal’ but did not require that ‘he submit those records for review’ by the Department.)).



### Withholding and Redaction

Please identify and inform us of all responsive or potentially responsive records within the statutorily prescribed time, and the basis of any claimed exemptions or privilege and to which specific responsive or potentially responsive record(s) such objection applies.

EPA must release "factual content". As the D.C. Court of Appeals noted, an agency must "describe the factual content of the documents and disclose it or provide an adequate justification for concluding that it is not segregable from the exempt portions of the documents." *King v. Department of Justice*, 830 F.2d 210, at 254 n.28 (D.C. Cir. 1987). As an example of how entire records should not be withheld when there is reasonably segregable information, we note that at bare minimum basic identifying information (who, what, when, *e.g.*, To, From, Date, and typically Subject) is not "deliberative". As the courts have emphasized, "the deliberative process privilege directly protects advice and opinions and *does not permit the nondisclosure of underlying facts* unless they would indirectly reveal the advice, opinions, and evaluations circulated within the agency as part of its decision-making process." *See Mead Data Central v. Department of the Air Force*, 566 F.2d 242, 254 n.28 (D.C. Cir. 1977) (emphasis added).

Pursuant to high-profile and repeated promises and instructions from the president and attorney general we request EPA err on the side of disclosure and not delay production of this information of great public interest through lengthy review processes to deliberate which withholdings they may be able to justify. We repeat by reference our detailed discussion of the background to and public interest of the requested records from pp. 3-7, *supra*.

This is particularly true for any information that EPA seeks to claim as reflecting (the oft-abused, per even Attorney General Holder) "deliberative process", in the absence of any actual formal EPA deliberation being underway truly antecedent to the adoption of an agency policy on the relevant matters (*see, e.g., Jordan v. DoJ*, 591 F.2d 753, 774 (D.C. Cir. 1978)). In fact, the likelihood of this is near zero., which is highly unlikely due to the nature of records that would be responsive to this request. It is also true for correspondence which may be embarrassing for the activism, perspectives or personal relationships it may reveal but which -- as precedent makes abundantly clear -- do not qualify a record as "personal".

Therefore, if EPA claims any records or portions thereof are exempt under *any* of FOIA's discretionary exemptions we request you exercise that discretion and release them consistent with statements by the President and Attorney General, *inter alia*, that **"The old rules said that if there was a defensible argument for not disclosing something to the American people, then it should not be disclosed. That era is now over, starting today" (President Barack Obama, January 21, 2009), and "Under the Attorney General's Guidelines, agencies are encouraged to make discretionary releases. Thus, even if an exemption would apply to a record, discretionary disclosures are encouraged.** Such releases are possible for records covered by a number of FOIA exemptions, including Exemptions 2, 5, 7, 8, and 9, but they will be most applicable under Exemption 5." (Department of Justice, Office of Information Policy, OIP Guidance, "Creating a 'New Era of Open Government'").

Nonetheless, if your office withholds any portion of the requested records as exempt from disclosure, please inform us of the basis of any partial denials or redactions. In the event that



some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable, non-exempt portions of the requested records. *See* 5 U.S.C. §552(b).

That means, for example, EPA must cease its ongoing pattern with CEI of over-broad claims of b5 “deliberative process” exemptions to withhold information which is not in fact truly antecedent to the adoption of an agency policy but merely embarrassing or inconvenient to disclose (*see e.g.*, EPA’s expansive b5 withholdings including also inexplicable withholding *in full* of emails in *CEI v EPA*, D.C.C. CV:12-1617; *Plaintiff’s Memorandum in Opposition to Defendant’s Motion for Summary Judgment*, pp. 25-38, Sept. 11, 2013).

If it is your position that a document contains non-exempt segments and that those non-exempt segments are so dispersed throughout the documents as to make segregation impossible, please state what portion of the document is non-exempt and how the material is dispersed through the document. *See Mead Data Central v. Department of the Air Force*, 455 F.2d at 261. Further, we request that you provide us with an index of those documents as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1972), with sufficient specificity “to permit a reasoned judgment as to whether the material is actually exempt under FOIA” pursuant to *Founding Church of Scientology v. Bell*, 603 F.2d 945, 959 (D.C. Cir. 1979), and “describ[ing] each document or portion thereof withheld, and for each withholding it must discuss the consequences of supplying the sought-after information.” *King v. Department of Justice*, 830 F.2d at 223-24.

**Claims of non-segregability must be made with the same practical detail as required for claims of exemption in a *Vaughn* index.** If a request is denied in whole, please state specifically that it is not reasonable to segregate portions of the record for release.

**Satisfying this Request contemplates providing copies of documents, in electronic format if you possess them as such, otherwise photocopies are acceptable.**

Please provide responsive documents in complete form, without any deletions or other edits and with any appendices or attachments and related email, text or Instant message threads as the case may be.

#### **Request for Fee Waiver**

**This discussion is detailed as a result of our recent experience of agencies, particularly EPA, improperly using denial of fee waivers to impose an economic barrier to access, an improper means of delaying or otherwise denying access to public records, despite our history of regularly obtaining fee waivers. We are not alone in this experience.<sup>11</sup>**

- 1) Disclosure would substantially contribute to the public at large's understanding of governmental operations or activities, on a matter of demonstrable public interest**

CEI requests waiver or reduction of all costs pursuant to 5 U.S.C. § 552(a)(4)(A)(iii)

("Documents shall be furnished without any charge...if disclosure of the information is in the

---

<sup>11</sup> See February 21, 2012 letter from public interest or transparency groups to four federal agencies requesting records regarding a newly developed pattern of fee waiver denials and imposition of "exorbitant fees" under FOIA as a barrier to access, available at <http://images.politico.com/global/2012/03/acluefffeewvrfoialtr.pdf>; see also *National Security Counselors v. CIA* (CV: 12-cv-00284(BAH), filed D.D.C Feb. 22, 2012); see also "Groups Protest CIA's Covert Attack on Public Access," OpenTheGovernment.org, February 23, 2012, <http://www.openthegovernment.org/node/3372>.



public interest because it is likely to contribute significantly to public understanding of the operations or activities of government and is not primarily in the commercial interest of the requester”).

EPA has expressly or effectively waived fees for CEI’s similar requests cited herein.

The information sought in this request is not sought for a commercial purpose. Requester is organized and recognized by the Internal Revenue Service as a 501(c)3 educational organization. With no possible commercial interest in these records, an assessment of that non-existent interest is not required in any balancing test with the public’s interest.

As a non-commercial requester, CEI is entitled to liberal construction of the fee waiver standards. 5 U.S.C.S. § 552(a)(4)(A)(iii), *Perkins v. U.S. Department of Veterans Affairs*, 754 F. Supp. 2d 1 (D.D.C. Nov. 30, 2010). Specifically, the public interest fee waiver provision “is to be liberally construed in favor of waivers for noncommercial requesters.” *McClellan Ecological Seepage Situation v. Carlucci*, 835 F. 2d 1284, 2184 (9th Cir. 1987).

FOIA is aimed in large part at promoting active oversight roles of watchdog public advocacy groups. “The legislative history of the fee waiver provision reveals that it was added to FOIA ‘in an attempt to prevent government agencies from using high fees to discourage certain types of requesters, and requests,’ in particular those from journalists, scholars and nonprofit public interest groups.” *Better Government Ass’n v. State*, 780 F.2d 86, 88-89 (D.C. Cir. 1986) (fee waiver intended to benefit public interest watchdogs), citing to *Ettlinger v. FBI*, 596 F. Supp.

867, 872 (D.Mass. 1984); SEN. COMM. ON THE JUDICIARY, AMENDING THE FOIA, S. REP. NO. 854, 93rd Cong., 2d Sess. 11-12 (1974)).<sup>12</sup>

Congress enacted FOIA clearly intending that “fees should not be used for the purpose of discouraging requests for information or as obstacles to disclosure of requested information.”

*Ettlinger v. FBI*, citing Conf. Comm. Rep., H.R. Rep. No. 1380, 93d Cong., 2d Sess. 8 (1974) at

8. Improper refusal of fees as a means of withholding records from a FOIA requester constitutes improper withholding. *Ettlinger v. FBI*.

Given this, “insofar as ...[agency] guidelines and standards in question act to discourage FOIA requests and to impede access to information for precisely those groups Congress intended to aid by the fee waiver provision, they inflict a continuing hardship on the non-profit public interest groups who depend on FOIA to supply their lifeblood -- information.” *Better Gov’t v. State* (internal citations omitted). The courts therefore will not permit such application of FOIA requirements that “‘chill’ the ability and willingness of their organizations to engage in activity that is not only voluntary, but that Congress explicitly wished to encourage.” *Id.* As such, Agency implementing regulations may not facially or in practice interpret FOIA’s fee waiver provision in a way creating a fee barrier for Requester.

---

<sup>12</sup> This was grounded in the recognition that the two plaintiffs in that merged appeal were, like Requester, public interest non-profits that “rely heavily and frequently on FOIA and its fee waiver provision to conduct the investigations that are essential to the performance of certain of their primary institutional activities -- publicizing governmental choices and highlighting possible abuses that otherwise might go undisputed and thus unchallenged. These investigations are the necessary prerequisites to the fundamental publicizing and mobilizing functions of these organizations. Access to information through FOIA is vital to their organizational missions.” *Better Gov’t v. State*. They therefore, like Requester, “routinely make FOIA requests that potentially would not be made absent a fee waiver provision”, requiring the court to consider the “Congressional determination that such constraints should not impede the access to information for appellants such as these.” *Id.*



"This is in keeping with the statute's purpose, which is 'to remove the roadblocks and technicalities which have been used by . . . agencies to deny waivers.'" *Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Educ.*, 593 F. Supp. 261, 268 (D.D.C. 2009), citing to *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987)(quoting 132 Cong. Rec. S16496 (Oct. 15, 1986) (statement of Sen. Leahy).

Requester's ability to utilize FOIA -- as well as many nonprofit organizations, educational institutions and news media who will benefit from disclosure -- depends on its ability to obtain fee waivers. For this reason, "Congress explicitly recognized the importance and the difficulty of access to governmental documents for such typically under-funded organizations and individuals when it enacted the 'public benefit' test for FOIA fee waivers. This waiver provision was added to FOIA 'in an attempt to prevent government agencies from using high fees to discourage certain types of requesters and requests,' in a clear reference to requests from journalists, scholars and, most importantly for our purposes, nonprofit public interest groups. Congress made clear its intent that fees should not be utilized to discourage requests or to place obstacles in the way of such disclosure, forbidding the use of fees as "toll gates" on the public access road to information.'" *Better Gov't Ass'n v. Department of State*.

As the *Better Government* court also recognized, public interest groups employ FOIA for activities "essential to the performance of certain of their primary institutional activities -- publicizing governmental choices and highlighting possible abuses that otherwise might go undisputed and thus unchallenged. These investigations are the necessary prerequisites to the fundamental publicizing and mobilizing functions of these organizations. Access to information through FOIA is vital to their organizational missions." That is true in the instant matter as well.

Indeed, CEI is precisely the sort of group the courts have identified in establishing this precedent.

Indeed, requester is precisely the sort of group the courts have identified in establishing this precedent.

Courts have noted FOIA's legislative history to find that a fee waiver request is likely to pass muster "if the information disclosed is new; supports public oversight of agency operations, including the quality of agency activities and the effects of agency policy or regulations on public health or safety; or, otherwise confirms or clarifies data on past or present operations of the government." *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d at 1284-1286.

This information request meets that description, for reasons both obvious and specified.

**The subject matter of the requested records specifically concerns identifiable operations or activities of the government.** The requested records directly relate to high-level promises by the President of the United States and the Attorney General to be "the most transparent administration, ever": is EPA properly maintaining correspondence sent and received on an alternative to electronic mail, on devices provided by EPA to senior officials exclusively for the performance of Agency duties with extremely limited circumstantial exceptions permitted, which class of records has apparently never been produced by EPA in response to FOIA and congressional requests for "records" and/or "electronic records".

This promise, in its serial incarnations, demanded and spawned widespread media coverage, and then of the reality of the administration's transparency efforts, and numerous transparency-oriented groups reporting on this performance, prompting further media and public interest (*see, e.g.*, an internet search of "study Obama transparency").



Particularly after Requester's recent discoveries using FOIA, its publicizing certain Agency record-management and electronic communication practices, controversial EPA correspondence (*e.g.*, re: Richard Windsor, use of non-official email accounts, destruction of text messages) and CEI's other efforts to disseminate the information, the public, media and congressional oversight bodies are very interested in how widespread are the violations of this pledge of unprecedented transparency. This request, when satisfied, will further inform this ongoing public discussion.

Potentially responsive records reflecting whether or not EPA has maintained and preserved text messages sent and received on Agency devices unquestionably reflect "identifiable operations or activities of the government."

The Department of Justice Freedom of Information Act Guide expressly concedes that this threshold is easily met. There can be no question that this is such a case.

**Disclosure is "likely to contribute" to an understanding of specific government operations or activities because the releasable material will be meaningfully informative in relation to the subject matter of the request.** The disclosure of the requested records have an informative value and are "likely to contribute to an understanding of Federal government operations or activities" just as did various studies of public records reflecting on the administration's transparency, returned in the above-cited search "study obama transparency", and the public records themselves that were released to those groups, contributed to public understanding of specific government operations or activities: this issue is of significant and increasing public interest, in large part due to the administration's own promises and continuing

claims, and revelations by outside groups accessing public records. To deny this and the substantial media and public interest, across the board from Fox News to PBS and The Atlantic, would be arbitrary and capricious, as would be denial that shedding light on **this heretofore unexplored but important aspect** of the issue would further and significantly inform the public.

Further, CEI is preparing a report on the specific issue of EPA electronic record preservation, including text messages, instant messages and non-EPA email accounts.

However, **the Department of Justice's Freedom of Information Act Guide makes it clear that, in the DoJ's view, the "likely to contribute" determination hinges in substantial part on whether the requested documents provide information that is not already in the public domain.** There is no reasonable claim to deny that, to the extent the requested information is available in the public domain, these are forms obtained and held only by EPA or its telephony carrier(s). Further, however, **this aspect of the important public debate, of heretofore never produced text message records and related practices, has yet to be explored outside of this request and our related requests most of which are ongoing.**

As such, this aspect of the important public debate, of the use by senior officials and Agency practices regarding text messaging as an alternative to email, is presently unfolding (see discussion of evolving EPA productions to CEI in this particular subject-matter realm, and related litigation producing the records that directly prompted the instant request), and related issues of electronic record preservation and other practices which have become the subject of congressional oversight including a recent hearing and inspector general scrutiny. It is therefore

clear that the requested records are "likely to contribute" to an understanding of your agency's decisions because they are not otherwise accessible other than through a FOIA request.

**The disclosure will contribute to the understanding of the public at large, as opposed to the understanding of the requester or a narrow segment of interested persons.**

CEI intends to post these records for public scrutiny and otherwise to broadly disseminate the information it obtains under this request by the means described, herein. CEI has spent years promoting the public interest advocating sensible policies to protect human health and the environment, routinely receiving fee waivers under FOIA (until recently, but even then on appeal) for its ability to disseminate public information. Further, as demonstrated herein and in the above litany of exemplars of newsworthy FOIA activity, requester and particularly undersigned counsel have an established practice of utilizing FOIA to educate the public, lawmakers and news media about the government's operations and, in particular, have brought to light important information about policies grounded in energy and environmental policy, like



EPA's,<sup>13</sup> specifically in the past year-plus relating to transparency and electronic record practices.

EPA has not exacted fees for these requests for the same reason it cannot now, and also cannot now for all reasons stated herein.

Requester intends to disseminate the information gathered by this request via media appearances (the undersigned appears regularly, to discuss his work, on national television and

---

<sup>13</sup> See, e.g., Stephen Dinan, "Do Text Messages from Feds Belong on Record? EPA's Chief's Case Opens Legal Battle", *Washington Times*, April 30, 2011, at A1. Other outlets covering this dissemination include Peter Foster, "More Good News for Keystone", *National Post*, Jan. 9, 2013, at 11; Juliet Eilperin, "EPA IG Audits Jackson's Private E-mail Account", *Washington Post*, December 19, at A6; James Gill, "From the Same Town, But Universes Apart", *New Orleans Times-Picayune*, Jan. 2, 2013, at B1; Kyle Smith, "Hide & Sneak", *New York Post*, Jan. 6, 2013, at 23. <http://www.breitbart.com/Big-Government/2013/01/27/EPA-email-Scandal-worse-than-originally-thought>; <http://www.breitbart.com/Big-Government/2013/01/14/epa-lisa-jackson-emails>; <http://www.breitbart.com/Big-Government/2013/02/22/EPA-Releases-Doc-Dump-Of-Black-Papers-On-Former-Chief-s-Alternative-E-Mail-Account>; Christopher C. Horner, EPA Circles Wagons in 'Richard Windsor' Email Scandal, Jan. 16, 2013, <http://www.breitbart.com/Big-Government/2013/01/16/What-s-in-a-Name-EPA-Goes-Full-Bunker-in-Richard-Windsor-EMail-Scandal>. See also, Stephen Dinan, "EPA Staff to Retrain on Open Records; Memo Suggests Breach of Policy," *Washington Times*, April 9, 2013, at A4; Stephen Dinan, "Suit Says EPA Balks at Release of Records; Seeks Evidence of Hidden Messages," *Washington Times*, April 2, 2013, at A1; Christopher C. Horner, "EPA administrators invent excuses to avoid transparency", *Washington Examiner*, Nov. 25, 2012, <http://washingtonexaminer.com/epa-administrators-invent-excuses-to-avoid-transparency/article/2514301>.



national and local radio shows, and weekly on the radio shows "Garrison" on WIBC Indianapolis and the nationally syndicated "Battle Line with Alan Nathan").<sup>14</sup>

---

<sup>14</sup> To avoid EPA's pattern of unsupportedly denying CEI's requests for fee waiver we provide an extensive if still not exclusive list of evidence of our intention, practice and ability to broadly disseminate information obtained from FOIA requests: Written Statement of Hans Bader, U.S. House of Representatives Committee on Oversight and Government Reform, Subcommittee on Regulatory Affairs, Stimulus Oversight and Government Spending Hearing Entitled Lasting Implications of the General Motors Bailout, June 22, 2011, <http://www.scribd.com/doc/58462911/Hans-Bader-Statement-for-Regulatory-Affairs-Subcommittee>; Hans Bader, Obama Administration Knew for Weeks That GM Would Make Fraudulent Claims, Examiner.com, June 2, 2011, <http://www.examiner.com/article/obama-administration-knew-for-weeks-that-gm-would-make-fraudulent-claims>; Christine Hall, Delayed Release of Auto Bailout Documents by Treasury Dept. Reveals Cozy PR Relationship: Agency Coughs Up Material on Eve of Obama Administration Hoopla, Press release, Competitive Enterprise Institute, June 2, 2011, <http://cei.org/news-releases/delayed-release-auto-bailout-documents-treasury-dept-reveals-cozy-pr-relationship> (this document is also available in Westlaw from the State News Service); Nicole Ciandella, CEI FOIA Request Reveals Relationship Between Treasury Department and GM, Open Market (Competitive Enterprise Institute blog), June 3, 2011, <http://www.openmarket.org/2011/06/03/cei-foia-request-reveals-relationship-between-treasury-department-and-gm/>; Hans Bader, Recently-Released Documents Reveal Obama Administration's Complicity in Deception about Auto Bailout, Global Warming.Org (CEI blog), June 2, 2011, <http://www.globalwarming.org/2011/06/02/recently-released-documents-reveal-obama-administration%E2%80%99s-complicity-in-deception-about-auto-bailout/>; Lee Doren, Hearing Today Will Shed Light on Negative Implications of General Motors Bailout, Press Release, Competitive Enterprise Institute, June 22, 2011, <http://cei.org/news-releases/hearing-today-will-shed-light-negative-implications-general-motors-bailout>; Hans Bader, Obama Administration Flouts FOIA Law, *Washington Examiner*, March 18, 2011, pg. 26; Stephen Dinan, "Researcher: NASA hiding climate data", *Washington Times*, A1, December 3, 2009, <http://www.washingtontimes.com/news/2009/dec/03/researcher-says-nasa-hiding-climate-data/?page=all>; <http://wattsupwiththat.com/2012/08/21/noaa-releases-tranche-of-foia-documents-2-years-later/>; <http://legaltimes.typepad.com/blt/2010/05/foia-suit-seeks-nasas-global-warming-data-.html>; <http://legaltimes.typepad.com/blt/2010/05/page/2/>; <http://legaltimes.typepad.com/blt/2010/11/global-warming-foia-suit-against-nasa-heats-up-again.html>.

See also, [http://www.cbsnews.com/8301-504383\\_162-5314040-504383.html](http://www.cbsnews.com/8301-504383_162-5314040-504383.html); [http://www.cbsnews.com/8301-504383\\_162-5322108-504383.html](http://www.cbsnews.com/8301-504383_162-5322108-504383.html); <http://www.foxnews.com/scitech/2011/12/16/complicit-in-climategate-doe-under-fire/>; <http://news.investors.com/ibd-editorials/031210-527214-the-big-wind-power-cover-up.htm?p=2>; <http://wattsupwiththat.com/2012/10/04/the-secret-ipcc-stocker-wg1-memo-found/>.



Requester also publishes materials based upon its research via print and electronic media, as well as in newsletters to legislators, education professionals, and other interested parties.<sup>15</sup> For a list of exemplar publications, please see <http://cei.org/publications>. Those activities are in fulfillment of CEI's mission. We intend to disseminate the information gathered by this request to the public at large and at no cost through one or more of the following: (a) newsletters; (b) opinion pieces in newspapers or magazines; (c) CEI's websites, which receive approximately 150,000 monthly visitors (appx. 125,000 unique)(See, e.g., [www.openmarket.org](http://www.openmarket.org), one of several blogs operated by CEI providing daily coverage of legal and regulatory issues, and [www.globalwarming.org](http://www.globalwarming.org) (another CEI blog); (d) in-house publications for public dissemination; (e) other electronic journals, including blogs to which our professionals contribute; (f) local and syndicated radio programs dedicated to discussing public policy; (g) to the extent that Congress or states engaged in relevant oversight or related legislative or judicial activities find that which is received noteworthy, it will become part of the public record on deliberations of the legislative branches of the federal and state governments on the relevant issues.

---

<sup>15</sup> See *EPIC v. DOD*, 241 F.Supp.2d 5 (D.D.C. 2003) (court ruled that the publisher of a bi-weekly electronic newsletter qualified as the media, entitling it to a waiver of fees on its FOIA request); *Forest Guardians v. U.S. Dept. of Interior*, 416 F.3d 1173, 1181-82 (10th Cir. 2005) (fee waiver granted for group that "aims to place the information on the Internet"; "Congress intended the courts to liberally construe the fee waiver requests of noncommercial entities").



CEI also is regularly cited in newspapers,<sup>16</sup> law reviews,<sup>17</sup> and legal and scholarly publications.<sup>18</sup>

With a foundational, institutional interest in and reputation for its leading role in the relevant policy debates and expertise in the subject of transparency, energy- and environment-related regulatory policies CEI unquestionably has the “specialized knowledge” and “ability and intention” to disseminate the information requested in the broad manner, and to do so in a manner that contributes to the understanding of the “public-at-large.”

---

<sup>16</sup> See, e.g., Al Neuharth, “Why Bail Out Bosses Who Messed It Up,” *USA Today*, Nov. 21, 2008, at 23A (quotation from Competitive Enterprise Institute) (available at 2008 WLNR 22235170); Bill Shea, “Agency Looks Beyond Criticism of Ads of GM Boasting About Repaid Loan,” *Crain’s Detroit Business*, May 17, 2010, at 3 (available at 2010 WLNR 10415253); Mona Charen, Creators Syndicate, “You Might Suppose That President Obama Has His Hands ...,” *Bismarck Tribune*, June 10, 2009, at A8 (syndicated columnist quoted CEI’s OpenMarket blog); Hal Davis, “Earth’s Temperature Is Rising and So Is Debate About It,” *Dayton Daily News*, April 22, 2006, at A6 (citing CEI’s GlobalWarming.Org); *Washington Examiner*, August 14, 2008, pg. 24, “Think-Tanking” (reprinting relevant commentary from OpenMarket); Mark Landsbaum, “Blogwatch: Biofuel Follies,” *Orange County Register*, Nov. 13, 2007 (citing OpenMarket) (available in Westlaw news database at 2007 WLNR 23059349); *Pittsburgh Tribune-Review*, “Best of the Blogs,” Oct. 7, 2007 (citing OpenMarket) (available in Westlaw news database at 2007 WLNR 19666326).

<sup>17</sup> See, e.g., Robert Hardaway, “The Great American Housing Bubble,” 35 *University of Dayton Law Review* 33, 34 (2009) (quoting Hans Bader of CEI regarding origins of the financial crisis that precipitated the TARP bailout program).

<sup>18</sup> See, e.g., Bruce Yandle, “Bootleggers, Baptists, and the Global Warming Battle,” 26 *Harvard Environmental Law Review* 177, 221 & fn. 272 (citing CEI’s GlobalWarming.Org); Deepa Badrinarayana, “The Emerging Constitutional Challenge of Climate Change: India in Perspective,” 19 *Fordham Environmental Law Review* 1, 22 & fn. 119 (2009) (same); Kim Diana Connolly, “Bridging the Divide: Examining the Role of the Public Trust in Protecting Coastal and Wetland Resources,” 15 *Southeastern Environmental Law Journal* 1, 15 & fn. 127 (2006) (same); David Vanderzwaag, et al., “The Arctic Environmental Protection Strategy, Arctic Council, and Multilateral Environmental Initiatives,” 30 *Denver Journal of International Law and Policy* 131, 141 & fn. 79 (2002) (same); Bradley K. Krehely, “Government-Sponsored Enterprise: A Discussion of the Federal Subsidy of Fannie Mae and Freddie Mac,” 6 *North Carolina Banking Institute* 519, 527 (2002) (quoting Competitive Enterprise Institute about potential bailouts in the future).

**The disclosure will contribute “significantly” to public understanding of government operations or activities.** We repeat and incorporate here by reference the above from discussion of how disclosure is “likely to contribute” to an understanding of specific government operations or activities. After disclosure of these records, the public’s understanding of this unexplored aspect of the now highly controversial claims of executive branch and administration transparency, and this heretofore unexplored but important aspect of the administration’s electronic record practices (text message use and retention or destruction), will inherently be significantly enhanced. The requirement that disclosure must contribute “significantly” to the public understanding is therefore met.

**As such**, the Requester has stated “with reasonable specificity that its request pertains to operations of the government,” and “the informative value of a request depends not on there being certainty of what the documents will reveal, but rather on the requesting party having explained with reasonable specificity how those documents would increase public knowledge of the functions of government.” *Citizens for Responsibility & Ethics in Washington v. U.S. Dep’t of Health and Human Services*, 481 F. Supp. 2d 99, 107-109 (D.D.C. 2006).

**2) Alternately, CEI qualifies as a media organization for purposes of fee waiver**

The provisions for determining whether a requesting party is a representative of the news media, and the “significant public interest” provision, are not mutually exclusive. Again, as CEI is a non-commercial requester, it is entitled to liberal construction of the fee waiver standards. 5 U.S.C.S. § 552(a)(4)(A)(iii), *Perkins v. U.S. Department of Veterans Affairs*. Alternately and only in the event EPA deviates from prior practice on similar requests and refuses to waive our fees under the “significant public interest” test, which we will then appeal while requesting EPA



proceed with processing on the grounds that we are a media organization, we request a waiver or limitation of processing fees pursuant to 5 U.S.C. § 552(a)(4)(A)(ii) ("fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by.... a representative of the news media...") and 40 C.F.R. §2.107(d)(1) ("No search or review fees will be charged for requests by educational institutions...or representatives of the news media."). However, we note that as documents are requested and available electronically, there are no copying costs.

Requester repeats by reference the discussion as to its publishing practices, reach and intentions all in fulfillment of CEI's mission from pages 20-24, *supra*,

For these reasons, Requester qualifies as a "representative[]" of the news media" under the statutory definition, because it routinely gathers information of interest to the public, uses editorial skills to turn it into distinct work, and distributes that work to the public. *See Electronic Privacy Information Center v. Department of Defense*, 241 F. Supp. 2d 5 (D.D.C. 2003)(non-profit organization that gathered information and published it in newsletters and otherwise for general distribution qualified as representative of news media for purpose of limiting fees). Courts have reaffirmed that non-profit requesters who are not traditional news media outlets can qualify as representatives of the new media for purposes of the FOIA, including after the 2007 amendments to FOIA. *See ACLU of Washington v. U.S. Dep't of Justice*, No. C09-0642RSL, 2011, 2011 U.S. Dist. LEXIS 26047 at \*32 (W.D. Wash. Mar. 10, 2011). *See also Serv. Women's Action Network v. DOD*, 2012 U.S. Dist. Lexis 45292 (D. Conn., Mar. 30, 2012).

Accordingly, any fees charged must be limited to duplication costs. The records requested are available electronically and are requested in electronic format; as such, there are no duplication costs other than the cost of a compact disc(s).

### CONCLUSION

We expect the Agency to release within the statutory period of time all segregable portions of responsive records containing properly exempt information, and to provide information that may be withheld under FOIA's discretionary provisions and otherwise proceed with a bias toward disclosure, consistent with the law's clear intent, judicial precedent affirming this bias, and President Obama's directive to all federal agencies on January 26, 2009. Memo to the Heads of Exec. Offices and Agencies, Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 26, 2009) ("The Freedom of Information Act should be administered with a clear presumption: in the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, or because of speculative or abstract fears.").

**We expect all aspects of this request be processed free from conflict of interest.**

We request the Agency provide particularized assurance that it is reviewing some quantity of records with an eye toward production on some estimated schedule, so as to establish some reasonable belief that it is processing our request. 5 U.S.C.A. § 552(a)(6)(A)(i). EPA must at least gather, review, and inform a requesting party of the scope of potentially responsive records, including the scope of the records it plans to produce and the scope of documents that it plans to withhold under any FOIA exemptions. *See Citizens for Responsible Ethics in Washington v. Federal Election Commission*, 711 F.3d 180, 188 (D.C. Cir. 2013). FOIA

specifically requires EPA to immediately notify CEI with a particularized and substantive determination, and of its determination and its reasoning, as well as CEI's right to appeal; further, FOIA's unusual circumstances safety valve to extend time to make a determination, and its exceptional circumstances safety valve providing additional time for a diligent agency to complete its review of records, indicate that responsive documents must be collected, examined, and reviewed in order to constitute a determination. *See Id.*, at 186 (D.C. Cir. 2013). *See also*, *Muttitt v. U.S. Central Command*, 813 F. Supp. 2d 221; 2011 U.S. Dist. LEXIS 110396 at \*14 (D.D.C. Sept. 28, 2011)(addressing "the statutory requirement that [agencies] provide estimated dates of completion").

We request a rolling production of records, such that the Agency furnishes records to my attention as soon as they are identified, preferably electronically, but as needed then to my attention, at the address below. We inform EPA of our intention to protect our appellate rights on this matter at the earliest date should EPA not comply with FOIA per, *e.g.*, *CREW v. FEC*.

If you have any questions please do not hesitate to contact me.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read 'C. Horner', with a long, sweeping horizontal line extending to the right.

Christopher C. Horner, Esq.

1899 L Street NW, Suite 1200  
Washington, DC 20036  
202.262.4458 (M)  
[CHorner@CEI.org](mailto:CHorner@CEI.org)



**From:** [Minoli, Kevin](#)  
**To:** [Miller, Kevin](#)  
**Cc:** [McDermott, Marna](#)  
**Subject:** FW: HQ-2014-002006  
**Date:** Friday, May 02, 2014 7:31:00 PM  
**Attachments:** [HQ-2014-002006 Request Letter.pdf](#)

---

(b) (5) DPP, (b) (5) ACP

Kevin S. Minoli  
Acting Principal Deputy General Counsel  
Office of General Counsel  
Main Office Line: 202-564-8064  
Direct Dial: 202-564-5551

---

**From:** Miller, Kevin  
**Sent:** Friday, May 02, 2014 1:41 PM  
**To:** Minoli, Kevin  
**Subject:** FW: HQ-2014-002006

Will call --

Kevin Miller | US EPA | Office of General Counsel | 1200 Pennsylvania Ave., NW | WJC North, Mail Code 2377A | Washington DC 20460 | phone: (202) 564-2691

---

**From:** Wachter, Eric  
**Sent:** Friday, May 02, 2014 1:37 PM  
**To:** Miller, Kevin  
**Cc:** Newton, Jonathan  
**Subject:** HQ-2014-002006

Hi, Kevin,

(b) (5) DPP, (b) (5) ACP

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Any thoughts on

this?

Thanks,

Eric

**From:** [Noga, Vaughn](#)  
**To:** [Minoli, Kevin](#)  
**Subject:** FW: Heads Up: CEI v. EPA (13-1074) text message billing  
**Date:** Tuesday, August 27, 2013 5:37:33 PM

---

Kevin,

(b) (5) DPP, (b) (5) ACP  
[REDACTED]

-----Original Message-----

From: Noga, Vaughn  
Sent: Tuesday, August 27, 2013 5:16 PM  
To: Reilly, Tom; Watkins, Harrell; Maher, Karen  
Subject: RE: Heads Up: CEI v. EPA (13-1074) text message billing

Tom,

(b) (5) DPP, (b) (5) ACP  
[REDACTED] ?

(b) (5) DPP, (b) (5) ACP  
[REDACTED]

Vaughn

-----Original Message-----

From: Reilly, Tom  
Sent: Tuesday, August 27, 2013 1:04 PM  
To: Noga, Vaughn; Watkins, Harrell; Maher, Karen  
Subject: Heads Up: CEI v. EPA (13-1074) text message billing

Vaughn,

(b) (5) DPP, (b) (5) ACP  
[REDACTED]

Tom

(b) (5) DPP, (b) (5) ACP  
[REDACTED]

[REDACTED]

-----Original Message-----

From: DAVIS, TANIKA

Sent: Tuesday, August 27, 2013 12:52 PM

To: Reilly, Tom

Subject: RE: CEI v. EPA (13-1074) text message billing

Tom,

Here is the info. (b) (5) DPP, (b) (5) ACP



Tanika Davis

ECS Team - EPA ITS - ACT II Contractor

Sr. Telecommunications Billing Analyst

Information Management Group/Mobile Devices Business Office

Tel: (919) 541-1823

Fax: (919) 685-3118

Email: davis.tanika@epa.gov

\*\*\*\*\*PLEASE NOTE\*\*\*\*\* If you require Mobile Device related assistance, please use the following contacts:

EZTech Locations - EPA Call Center 866-411-4372 (option 3) or EZTech@epa.gov All Other Locations - EPA Call Center at 866-411-4EPA or EPACALLCENTER@epa.gov

Act mindfully. Accept entirely. Move strongly. Think softly. Speak beautifully. Live simply. Love completely.

-----Original Message-----

From: Reilly, Tom

Sent: Tuesday, August 27, 2013 11:04 AM

To: DAVIS, TANIKA

Subject: FW: CEI v. EPA (13-1074) text message billing

Importance: High

-----Original Message-----



From: Weinstock, Larry  
Sent: Tuesday, August 27, 2013 9:28 AM  
To: Reilly, Tom  
Cc: Anderson, Cindy  
Subject: FW: CEI v. EPA (13-1074) text message billing  
Importance: High

Tom,

(b) (5) DPP, (b) (5) ACP  
[Redacted]

Don't hesitate to call me with any questions.

Many thanks,  
Larry Weinstock  
Program Innovation Coordinator  
Office of Air and Radiation  
202-564-9226

(b) (5) DPP, (b) (5) ACP  
[Redacted]

[Redacted]

**From:** [Dierker, Carl](#)  
**To:** [Minoli, Kevin](#)  
**Cc:** [Metcalf, Jill](#); [Grantham, Nancy](#)  
**Subject:** FW: Heads up on a New FOAI Assignment (EPA-HQ-2014-002006) - FOIA re Text Messages  
**Date:** Thursday, January 16, 2014 5:02:25 PM

---

Hi Kevin – (b) (5) DPP, (b) (5) ACP

[REDACTED]

Thanks,  
Carl

\*\*\*\*\*

Carl F. Dierker  
Regional Counsel  
U.S. EPA -- Region 1, New England  
5 Post Office Square  
Boston, Massachusetts 02109-3912  
tel: 617-918-1091  
fax: 617-918-0091  
e-mail: [dierker.carl@epa.gov](mailto:dierker.carl@epa.gov)

---

**From:** Grantham, Nancy  
**Sent:** Tuesday, January 14, 2014 1:00 PM  
**To:** Schena, Cristeen  
**Cc:** Minoli, Kevin; Dierker, Carl; Metcalf, Jill  
**Subject:** FW: Heads up on a New FOAI Assignment (EPA-HQ-2014-002006) - FOIA re Text Messages

Cris – (b) (5) DPP, (b) (5) ACP

[REDACTED]

Thanks

ng

---

**From:** Diehl, Chris  
**Sent:** Monday, January 13, 2014 9:12 PM  
**To:** Grantham, Nancy  
**Cc:** Giffen, Tom  
**Subject:** FW: Heads up on a New FOAI Assignment (EPA-HQ-2014-002006) - FOIA re Text Messages



(b) (5) DPP, (b) (5) ACP

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

---

**From:** Giffen, Tom

**Sent:** Thursday, January 09, 2014 8:54 AM

**To:** Little, Douglas

**Subject:** FW: Heads up on a New FOAI Assignment (EPA-HQ-2014-002006) - FOIA re Text Messages

Here is the chain covering the FOIA we discussed.

Thanks,

Tom Giffen  
Chief, Information Technology Section  
EPA Region 1 OARM  
5 Post Office Square, Suite 100  
MailCode OARM0201  
Boston, MA 02109-3912  
617-918-1444

---

**From:** Lee, Warren

**Sent:** Thursday, January 09, 2014 8:23 AM

**To:** Diehl, Chris

**Cc:** Giffen, Tom; Boudrot, Steve

**Subject:** RE: Heads up on a New FOAI Assignment (EPA-HQ-2014-002006) - FOIA re Text Messages

(b) (5) DPP, (b) (5) ACP

[REDACTED]

[REDACTED]

[REDACTED]

---

**From:** Diehl, Chris

**Sent:** Thursday, January 09, 2014 7:26 AM

**To:** Lee, Warren

**Cc:** Giffen, Tom; Boudrot, Steve

**Subject:** Fw: Heads up on a New FOAI Assignment (EPA-HQ-2014-002006) - FOIA re Text Messages

**Importance:** High

(b) (5) DPP, (b) (5) ACP

[REDACTED]

[REDACTED]

---

**From:** Grantham, Nancy

**Sent:** Thursday, January 09, 2014 6:18:53 AM

**To:** Diehl, Chris

**Subject:** Fw: Heads up on a New FOAI Assignment (EPA-HQ-2014-002006) - FOIA re Text Messages

(b) (5) DPP, (b) (5) ACP

? Thx

---

**From:** Schena, Cristeen

**Sent:** Wednesday, January 08, 2014 1:38:08 PM

**To:** Grantham, Nancy

**Subject:** FW: Heads up on a New FOAI Assignment (EPA-HQ-2014-002006) - FOIA re Text Messages

Here it is, the FOIA regarding text messages, I have not received the official 'task' yet but I'm assuming the due date will be before or by January 21<sup>st</sup>.

(b) (5) DPP, (b) (5) ACP

. Keep me posted ☺

Cris

---

**From:** Hamilton, Sabrina

**Sent:** Wednesday, January 08, 2014 1:31 PM

**To:** Lewis, Monica; Meekins, Tanya; Russell, Sherry; Painter, Michele; Newton, Jonathan; Bruce, Barbara

**Cc:** Faulkner, Martha; Hammond, Gloria; Weinstock, Larry; Schena, Cristeen

**Subject:** FW: Heads up on a New FOAI Assignment (EPA-HQ-2014-002006)

Monica,

Please assign a task for this FOIA case to Region 1 for coordination with OAR. Larry Weinstock is the point of contact and he and Jonathan Newton has provided feedback concerning this case in the emails below.

Tanya, Sherry, Michele, Jonathan and Barbara,

Please check FOIAonline for a "task" that was assigned to your office for coordination with OAR-IO.

Please provide responsive document by January 16, 2014. If you have any questions, please contact Larry Weinstock. Thanks

*Sabrina*

Sabrina Hamilton

Air and Radiation Liaison Specialist

and FOIA Coordinator

Office of Air and Radiation - Correspondence Unit

U.S. Environmental Protection Agency (EPA)

1200 Pennsylvania Avenue, N.W. (6101-A)

Washington, D.C. 20460

Tel: (202) 564-1083  
Fax: (202) 501-0600

---

**From:** Weinstock, Larry  
**Sent:** Thursday, January 02, 2014 3:40 PM  
**To:** McCabe, Janet; Goffman, Joseph; Russell, Sherry; Huang, Cindy; Meekins, Tanya; Painter, Michele  
**Cc:** Noonan, Jenny; Stewart, Lori; Hamilton, Sabrina  
**Subject:** Heads up on a New FOAI Assignment (EPA-HQ-2014-002006)

EPA has received the attached FOIA from Chris Horner. It is a follow-up from an earlier FOIA concerning Gina's text bill. (b) (5) DPP, (b) (5) ACP

As a result Mr. Horner is asking for all the text messages, on EPA provided cell phones from the following people:

- 1) **Joe Goffman**, Senior Counsel OAR
- 2) **Janet McCabe**
- 3) **Margo Oge**, OTAQ (retired late 2012)
- 4) **Cindy Huang**, Staff Assistant To the Assistant Administrator
- 5) Scott Fulton, former EPA General Counsel
- 6) Steve Page, Director, OAQPS, Research Triangle Park (RTP)
- 7) Peter Tsirigotis, Director, Sector Policies and Programs Division, OAR:OAQPS, RTP
- 8) Mike Flynn, Director, Office of Radiation and Indoor Air, EPA HQ
- 9) Bob Perciasepe
- 10) Curt Spalding, Regional Administrator EPA Region
- 11) Nancy Grantham, Director, EPA RI, Office of Public Affairs
- 12) Ira W. Leighton, former deputy RA, Region

Mr. Horner wants all messages from June 2009 until the date of the processing which is today January 2, 2014. (b) (5) DPP, (b) (5) ACP

Thanks

Larry Weinstock  
Program Innovation Coordinator  
Office of Air and Radiation  
202-564-9226

---

**From:** Weinstock, Larry  
**Sent:** Monday, December 30, 2013 2:39 PM  
**To:** Faulkner, Martha; Stewart, Lori  
**Cc:** Hamilton, Sabrina  
**Subject:** RE: New FOAI Assignment (EPA-HQ-2014-002006)

Martha,

(b) (5) DPP, (b) (5) ACP

. I need to see the more detailed information  
in the attachment.

Thanks  
Larry

---

**From:** Faulkner, Martha  
**Sent:** Monday, December 30, 2013 2:32 PM  
**To:** Stewart, Lori  
**Cc:** Weinstock, Larry; Hamilton, Sabrina  
**Subject:** New FOAI Assignment (EPA-HQ-2014-002006)

Good Afternoon Lori ,

(b) (5) DPP, (b) (5) ACP . Thanks

Martha

---

**From:** Newton, Jonathan  
**Sent:** Friday, December 27, 2013 1:59 PM  
**To:** Lewis, Monica; Hamilton, Sabrina  
**Cc:** Gottesman, Larry  
**Subject:** HQ-2014-0002006 - Reassignment to OAR

Hi Monica and Sabrina,

This is a request seeking text messages from twelve individuals: Joe Goffman (OAR); Janet McCabe (OAR); Margo Oge (OAR); Cindy Huang (OAR); Steve Page (OAR); Peter Tsirigotis (OAR); Mike Flynn (OAR); Curt Spalding (R1); Nancy Grantham (R1); Bob Perciasepe (AO); Scott Fulton (Formerly OGC); and Ira W. Leighton (Formerly R1).

(b) (5) DPP, (b) (5) ACP

Thanks

Jonathan V. Newton, Attorney-Advisor  
U.S. EPA, Office of the Executive Secretariat  
1200 Pennsylvania Avenue, NW (MC 1105A)  
Washington, D.C. 20460  
(202) 566-1981



**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

COMPETITIVE ENTERPRISE INSTITUTE     )  
1899 L Street, N.W., 12<sup>th</sup> Floor         )  
Washington, D.C. 20036                 )

Plaintiff,                                     )

v.                                                 )

Civil Action No. 13-

UNITED STATES ENVIRONMENTAL     )  
PROTECTION AGENCY                 )  
1200 Pennsylvania Avenue, N.W.     )  
Washington, D.C. 20460               )

Defendant.                                 )

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

Plaintiff COMPETITIVE ENTERPRISE INSTITUTE (“CEI”) for its complaint against Defendant UNITED STATES ENVIRONMENTAL PROTECTION AGENCY (“EPA” or “the Agency”), alleges as follows:

- 1) This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, to compel production under a FOIA request seeking certain EPA text message transcripts (“texts” or “text messages”).
- 2) On April 26, 2013, CEI submitted its request seeking those records, all of which which were created on an EPA-assigned personal digital assistant or personal data assistant (PDA), and sent or received by a senior EPA official, Assistant Administrator for Air and Radiation Gina McCarthy, on eighteen specified dates.
- 3) Defendant EPA has provided neither responsive records nor the substantive response required by statute.

- 4) Text messaging is used as an alternative medium of communication to electronic mail (email), and texting accounts are specifically provided to certain officials for the purpose of enabling performance of particular official functions.
- 5) These texts are “agency records” under federal record-keeping and disclosure laws. They are of significant public interest, especially due to EPA’s recurrent failure to produce text message transcripts in response to FOIA and congressional oversight requests.
- 6) Plaintiff CEI states on information and belief that Ms. McCarthy regularly used text messaging as an alternative to email for work-related communications, and that a senior Agency official cautioned McCarthy to cease using that function on her PDA, due to concerns about the propriety of her texting about Members of Congress specifically on days when she testified before either the House or Senate.
- 7) Compelling EPA to respond, whether by releasing responsive records, or issuing a “no records” response, will shed light on EPA’s recordkeeping practices and compliance with its legal obligations. Specifically, this will inform the public about why EPA has failed to produce this class of records in response to requests clearly seeking them, by indicating whether EPA has been preserving this class of records as required by law but simply not turning them over, or whether it is failing to preserve (*i.e.*, destroying) them, in violation of law and policy.
- 8) Since the text messages at issue were sent to and from the current nominee to be EPA’s new administrator (who was specifically charged by EPA with responsibility for ensuring its Air Office’s compliance with applicable recordkeeping law and

policy), these records, and whether Ms. McCarthy fulfilled her obligation to maintain and to produce them, are of significant public interest.

- 9) Despite this, and in the face of revelations about organized and systemic abuses by senior federal employees to hide from the public their activities, particularly their electronic communications, EPA has failed to provide the required response.

Accordingly, Plaintiff files this lawsuit to compel EPA to comply with the law.

### **PARTIES**

- 10) Plaintiff CEI is a public policy research and educational institute in Washington, D.C., dedicated to advancing responsible regulation and in particular economically sustainable environmental policy. CEI's programs include research, investigative journalism and publication, as well as a transparency initiative seeking public records relating to environmental policy and how policymakers use public resources.
- 11) Defendant EPA is a federal agency headquartered in Washington, D.C. whose stated mission is to "protect human health and the environment."

### **JURISDICTION AND VENUE**

- 12) This Court has jurisdiction pursuant to 5 U.S.C. § 552(a)(4)(B), because this action is brought in the District of Columbia, and 28 U.S.C. § 1331, because the resolution of disputes under FOIA presents a federal question.
- 13) Venue is proper in this Court under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e) because Plaintiff resides in the District of Columbia, and defendant EPA is a federal agency.

### **FURTHER FACTUAL BACKGROUND**

- 14) EPA has not provided any records, or substantive response, to CEI's FOIA request for Assistant Administration McCarthy's text messages. Nor has it sought or made the case for more time to respond, or for more information.
- 15) To date, Defendant EPA has only acknowledged receipt of the request, said it will respond to the request at some unspecified future time, and informed CEI that its request is "non-billable" under FOIA.<sup>1</sup> (Typically, FOIA requests are non-billable when they can be handled in two hours or less. *See* 5 U.S.C. § 552(a)(4)(A)(iv)).
- 16) Through its determination that the FOIA request was non-billable, the EPA effectively conceded that it was able to provide a substantive response to the FOIA request with minimal effort, yet it did not do so.
- 17) Transparency in government is the subject of high-profile vows by the president and attorney general that FOIA will "be administered with a clear presumption: In the face of doubt, openness prevails" (*See* Attorney General Eric Holder, *OIP Guidance, President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines, Creating a "New Era of Open Government"*, [www.justice.gov/oip/foiapost/2009foiapost8.htm](http://www.justice.gov/oip/foiapost/2009foiapost8.htm); *Memorandum for the Heads of Executive Departments*, [www.whitehouse.gov/the\\_press\\_office/Freedom\\_of\\_Information\\_Act](http://www.whitehouse.gov/the_press_office/Freedom_of_Information_Act).)

### **Plaintiff CEI's FOIA Request HQ-2013-006005 Seeking Certain Specified Text Messages of Gina McCarthy**

- 18) On April 26, 2013, CEI submitted a FOIA Request by electronic mail to [hq.foia@epa.gov](mailto:hq.foia@epa.gov), seeking (emphases in original)<sup>2</sup>:

---

<sup>1</sup> See *infra*, ¶ 20.

<sup>2</sup> This is the email address specified by the government for submission of FOIA requests such as CEI's.

copies of all text messages<sup>1</sup> sent by Assistant Administrator for Air and Radiation Gina McCarthy on a mobile telephone provided for her use by the Agency, on the following eighteen days:

**2009:** July 9, 2009; July 14, 2009

**2010:** July 22, 2010; March 4, 2010; March 24, 2010

**2011:** March 1, 2011; March 13, 2011; March 24, 2011; April 13, 2011; May 13, 2011; June 30, 2011; September 8, 2011; September 15, 2011; October 12, 2011; October 25, 2011

**2012:** February 28, 2012; June 19, 2012; June 29, 2012.

**Defendant's Response to Plaintiff's FOIA Request**

- 19) EPA assigned this request identification number EPA-HQ-2013-006005 by letter dated and sent by electronic mail on May 9, 2013.
- 20) This letter stated in pertinent part, "The Office of the Administrator will be responding to your request, your request did not reach the billable amount."<sup>3</sup>

**LEGAL ARGUMENTS**

**Text Messages are "Agency Records" Under Federal Record-Keeping and Disclosure Laws, and EPA's Implementing Policies**

- 21) EPA provides certain employees with PDAs and text messaging capability as an option to email for official or otherwise work-related internal or external communications.
- 22) Text messaging correspondence are agency records and must be maintained and produced as such. *See, e.g.,* National Archives, *Frequently Asked Questions About Instant Messaging*, <http://www.archives.gov/records-mgmt/initiatives/im-faq.html>

---

<sup>3</sup> See May 9, 2013 letter from National FOIA Officer Larry Gottesman to CEI counsel Christopher Horner.

(Instant Messaging (IM) content can “qualify as a Federal Record,” since IM “allows users” to “exchange text messages,” which are “machine readable materials” and thus within the “statutory definition of records”); *Frequent Questions about E-Mail and Records*, <http://www.epa.gov/records/faqs/email.htm>; *Frequent Questions about Mobile and Portable Devices, and Records*, [www.epa.gov/records/faqs/pda.htm](http://www.epa.gov/records/faqs/pda.htm); *Memo to All Staff, “Transparency at EPA,”* by Acting Administrator Bob Perciasepe, dated April 8, 2013 (“the Inspector General currently is conducting an audit of the agency’s records management practices and procedures. We have suggested they place focus on electronic records including email and instant messaging. While we have made progress in these areas, we are committed to addressing any concerns or weaknesses that are identified in this audit . . . to strengthen our records management system”).<sup>4</sup>

**Defendant EPA Owed and Has Failed to Provide Plaintiff a Meaningful, Productive Response to its Request**

23) FOIA provides that a requesting party is entitled to a substantive agency response within twenty working days, affirming the agency is processing the request and intends to comply. It must rise to the level of indicating “that the agency is exercising due diligence in responding to the request...Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request.” (5 U.S.C. § 552(a)(6)(C)(i)). Alternatively, the agency must cite “exceptional circumstances” and request, and make the case for, an

---

<sup>4</sup> See also April 11, 2008 memorandum from John B. Ellis, EPA, to Paul Wester, National Archives and Records Administration, at 4 (reporting discovery of record-keeping problems); *Records and ECMS Briefing, EPA Incoming Political Appointees 2009*, [http://www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore\\_id=60afa4b3-3e5d-4e6f-b81e-64998f0d3c67](http://www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=60afa4b3-3e5d-4e6f-b81e-64998f0d3c67).

extension that is necessary and proper to the specific request. *See, e.g., Buc v. FDA*, 762 F.Supp.2d 62, 67-73 (D.D.C. 2011).

- 24) EPA regulations state, *inter alia*, “(a) Unless the Agency and the requester have agreed otherwise, or when unusual circumstances exist as provided in paragraph (e) of this section, EPA offices will respond to requests no later than 20 working days from the date the request is received and logged in by the appropriate FOI Office. EPA will ordinarily respond to requests in the order in which they were received. If EPA fails to respond to your request within the 20 working day period, or any authorized extension of time, you may seek judicial review to obtain the records without first making an administrative appeal.” 40 C.F.R. § 2.104..
- 25) Within 20 working days EPA must at least have informed the requesting party of the scope of potentially responsive records, including the scope of the records it plans to produce and the scope of documents that it plans to withhold under any FOIA exemptions. *See Citizens for Responsible Ethics in Washington v. Federal Election Commission*, 711 F.3d 180, 186 (D.C. Cir. 2013)(“CREW”). That information should include an estimated schedule for completion of the production. *See* 5 U.S.C. § 552(a)(6)(A)(i); *Muttitt v. U.S. Central Command*, 813 F. Supp. 2d 221, 227 (D.D.C. 2011) (addressing “the statutory requirement that [agencies] provide estimated dates of completion”).
- 26) FOIA specifically requires EPA to have, by this time, provided CEI with a particularized and substantive determination, including its reasoning, as well as notice of CEI’s right to appeal. *See CREW*, 711 F.3d at 186.
- 27) EPA owed CEI a substantive response to its request by May 24, 2013.

- 28) After acknowledging CEI's request, EPA did not substantively respond, or order production of responsive records, or indicate that a certain quantity of records was being reviewed with an eye toward production on some estimated schedule. Nor has it sought and made its case for an extension of time to respond to the request as required when "exceptional circumstances" exist.

**Having Failed to Properly Respond to Plaintiff's Request, Defendant EPA Owes Plaintiff Responsive Records**

- 29) In short, EPA has provided no responsive records or substantive response to CEI. Due to this failure to substantively respond to CEI's request, CEI need not administratively appeal, but instead may seek relief from this Court, under well-established precedent.
- 30) Thus, EPA is now legally required to provide CEI records responsive to its request.

**FIRST CLAIM FOR RELIEF**

**Duty to Release Certain Described Text Messages -- Declaratory Judgment**

- 31) Plaintiff re-alleges paragraphs 1-30 as if fully set out herein.
- 32) FOIA requires all doubts to be resolved in favor of disclosure. It allows the citizenry to learn "what their government is up to." *NRA v. Favish* 541 U.S. 157, 171 (quoting *U.S. Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 773 (1989)). The act is designed to "pierce the veil of administrative secrecy and to open agency action to the light of scrutiny." *Dep't of the Air Force v. Rose*, 425 U.S. 352 (1976). It is a transparency-forcing law, consistent with "the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Id.*
- 33) Plaintiff has sought and been denied production of responsive records reflecting the conduct of official business.



- 34) Plaintiff has a statutory right to the information it seeks.
- 35) EPA failed to provide Plaintiff responsive records or a substantive response.
- 36) CEI has exhausted its administrative remedies.
- 37) CEI asks this Court to enter a judgment declaring that
  - i. The EPA text message records described in Plaintiff's request No. HQ-2013-006005, and any attachments thereto, are public records, and as such, are subject to release under FOIA;
  - ii. EPA must release those requested records;
  - iii. EPA's denial of CEI's FOIA request is not reasonable, and does not satisfy EPA's obligations under FOIA; and
  - iv. EPA's refusal to produce the requested records is unlawful.

**SECOND CLAIM FOR RELIEF**

**Release of Certain Described Text Messages -- Injunctive Relief**

- 38) Plaintiff re-alleges paragraphs 1-37 as if fully set out herein.
- 39) CEI is entitled to injunctive relief compelling EPA to produce all records in its possession responsive to CEI's FOIA request.
- 40) This Court should enter an injunction ordering EPA to produce to CEI within 10 business days of the date of the order, the requested "text" records described in Plaintiff's request No. HQ-2013-006005, and any attachments thereto.

**THIRD CLAIM FOR RELIEF**

**Costs And Fees – Injunctive Relief**

- 41) Plaintiff re-alleges paragraphs 1-40 as if fully set out herein.
- 42) Pursuant to 5 U.S.C. § 552(a)(4)(E), the Court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.
- 43) This Court should enter an injunction ordering the Defendant to pay reasonable attorney fees and other litigation costs reasonably incurred in this case.

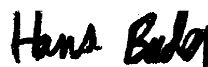
44) CEI has a statutory right to the records that it seeks, EPA has not fulfilled its statutory obligations to provide the records or a substantive response, and there is no legal basis for withholding the records.

WHEREFORE, Plaintiff requests the declaratory and injunctive relief herein sought, and an award for its attorney fees and costs and such other and further relief as the Court shall deem proper.

Respectfully submitted this 29<sup>th</sup> day of May, 2013,



Christopher C. Horner  
D.C. Bar No. 440107  
1899 L Street, NW, 12<sup>th</sup> Floor  
Washington, D.C. 20036  
(202) 262-4458  
[chris.horner@cei.org](mailto:chris.horner@cei.org)



Hans Bader, D.C. Bar No. 466545  
Sam Kazman, D.C. Bar No. 946376  
Competitive Enterprise Institute  
1899 L St., N.W., 12<sup>th</sup> Floor  
Washington, D.C. 20036  
(202) 331-2278, [hbader@cei.org](mailto:hbader@cei.org)  
Attorneys for Plaintiff

## CIVIL COVER SHEET

JS-44 (Rev. 3/13 DC)

|                                                                                                                                                                                                               |                                                                                                                                                                                                                                                                                   |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>I. (a) PLAINTIFFS</b><br>COMPETITIVE ENTERPRISE INSTITUTE<br><br>(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF <u>Wash., DC</u><br>(EXCEPT IN U.S. PLAINTIFF CASES)                                    | <b>DEFENDANTS</b><br>UNITED STATES ENVIRONMENTAL PROTECTION AGENCY<br><br>COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT <u>Washington DC</u><br>(IN U.S. PLAINTIFF CASES ONLY)<br><small>NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED</small> |
| (c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)<br>Hans Bader & Christopher C. Horner<br>Competitive Enterprise Institute<br>1899 L Street, NW, 12th Floor, Washington, D.C. 20036<br>(202) 331-2278 | ATTORNEYS (IF KNOWN)                                                                                                                                                                                                                                                              |

| <b>II. BASIS OF JURISDICTION</b><br>(PLACE AN X IN ONE BOX ONLY)                                                                                                                                                                                                                                                                                                                                                                                                                                                    | <b>III. CITIZENSHIP OF PRINCIPAL PARTIES</b> (PLACE AN X IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT) <b>FOR DIVERSITY CASES ONLY!</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |                         |                                                               |                         |                         |     |     |                       |                         |                         |                                                           |                         |                         |                          |                         |                         |                                                               |                         |                         |                                         |                         |                         |                |                         |                         |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------|---------------------------------------------------------------|-------------------------|-------------------------|-----|-----|-----------------------|-------------------------|-------------------------|-----------------------------------------------------------|-------------------------|-------------------------|--------------------------|-------------------------|-------------------------|---------------------------------------------------------------|-------------------------|-------------------------|-----------------------------------------|-------------------------|-------------------------|----------------|-------------------------|-------------------------|
| <div style="display: flex; justify-content: space-between;"> <div> <input type="radio"/> 1 U.S. Government Plaintiff         </div> <div> <input type="radio"/> 3 Federal Question (U.S. Government Not a Party)         </div> </div> <div style="display: flex; justify-content: space-between; margin-top: 10px;"> <div> <input checked="" type="radio"/> 2 U.S. Government Defendant         </div> <div> <input type="radio"/> 4 Diversity (Indicate Citizenship of Parties in item III)         </div> </div> | <table style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th></th> <th style="text-align: center;">PTF</th> <th style="text-align: center;">DFT</th> <th></th> <th style="text-align: center;">PTF</th> <th style="text-align: center;">DFT</th> </tr> </thead> <tbody> <tr> <td>Citizen of this State</td> <td style="text-align: center;"><input type="radio"/> 1</td> <td style="text-align: center;"><input type="radio"/> 1</td> <td>Incorporated or Principal Place of Business in This State</td> <td style="text-align: center;"><input type="radio"/> 4</td> <td style="text-align: center;"><input type="radio"/> 4</td> </tr> <tr> <td>Citizen of Another State</td> <td style="text-align: center;"><input type="radio"/> 2</td> <td style="text-align: center;"><input type="radio"/> 2</td> <td>Incorporated and Principal Place of Business in Another State</td> <td style="text-align: center;"><input type="radio"/> 5</td> <td style="text-align: center;"><input type="radio"/> 5</td> </tr> <tr> <td>Citizen or Subject of a Foreign Country</td> <td style="text-align: center;"><input type="radio"/> 3</td> <td style="text-align: center;"><input type="radio"/> 3</td> <td>Foreign Nation</td> <td style="text-align: center;"><input type="radio"/> 6</td> <td style="text-align: center;"><input type="radio"/> 6</td> </tr> </tbody> </table> |                         | PTF                                                           | DFT                     |                         | PTF | DFT | Citizen of this State | <input type="radio"/> 1 | <input type="radio"/> 1 | Incorporated or Principal Place of Business in This State | <input type="radio"/> 4 | <input type="radio"/> 4 | Citizen of Another State | <input type="radio"/> 2 | <input type="radio"/> 2 | Incorporated and Principal Place of Business in Another State | <input type="radio"/> 5 | <input type="radio"/> 5 | Citizen or Subject of a Foreign Country | <input type="radio"/> 3 | <input type="radio"/> 3 | Foreign Nation | <input type="radio"/> 6 | <input type="radio"/> 6 |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     | PTF                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    | DFT                     |                                                               | PTF                     | DFT                     |     |     |                       |                         |                         |                                                           |                         |                         |                          |                         |                         |                                                               |                         |                         |                                         |                         |                         |                |                         |                         |
| Citizen of this State                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               | <input type="radio"/> 1                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | <input type="radio"/> 1 | Incorporated or Principal Place of Business in This State     | <input type="radio"/> 4 | <input type="radio"/> 4 |     |     |                       |                         |                         |                                                           |                         |                         |                          |                         |                         |                                                               |                         |                         |                                         |                         |                         |                |                         |                         |
| Citizen of Another State                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            | <input type="radio"/> 2                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | <input type="radio"/> 2 | Incorporated and Principal Place of Business in Another State | <input type="radio"/> 5 | <input type="radio"/> 5 |     |     |                       |                         |                         |                                                           |                         |                         |                          |                         |                         |                                                               |                         |                         |                                         |                         |                         |                |                         |                         |
| Citizen or Subject of a Foreign Country                                                                                                                                                                                                                                                                                                                                                                                                                                                                             | <input type="radio"/> 3                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | <input type="radio"/> 3 | Foreign Nation                                                | <input type="radio"/> 6 | <input type="radio"/> 6 |     |     |                       |                         |                         |                                                           |                         |                         |                          |                         |                         |                                                               |                         |                         |                                         |                         |                         |                |                         |                         |

## IV. CASE ASSIGNMENT AND NATURE OF SUIT

(Place an X in one category, A-N, that best represents your Cause of Action and one in a corresponding Nature of Suit)

|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <input type="radio"/> <b>A. Antitrust</b><br><br><input type="checkbox"/> 410 Antitrust                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               | <input type="radio"/> <b>B. Personal Injury/Malpractice</b><br><br><input type="checkbox"/> 310 Airplane<br><input type="checkbox"/> 315 Airplane Product Liability<br><input type="checkbox"/> 320 Assault, Libel & Slander<br><input type="checkbox"/> 330 Federal Employers Liability<br><input type="checkbox"/> 340 Marine<br><input type="checkbox"/> 345 Marine Product Liability<br><input type="checkbox"/> 350 Motor Vehicle<br><input type="checkbox"/> 355 Motor Vehicle Product Liability<br><input type="checkbox"/> 360 Other Personal Injury<br><input type="checkbox"/> 362 Medical Malpractice<br><input type="checkbox"/> 365 Product Liability<br><input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability<br><input type="checkbox"/> 368 Asbestos Product Liability | <input type="radio"/> <b>C. Administrative Agency Review</b><br><br><input type="checkbox"/> 151 Medicare Act<br><br><b>Social Security</b><br><input type="checkbox"/> 861 HIA (1395ff)<br><input type="checkbox"/> 862 Black Lung (923)<br><input type="checkbox"/> 863 DIWC/DIWW (405(g))<br><input type="checkbox"/> 864 SSID Title XVI<br><input type="checkbox"/> 865 RSI (405(g))<br><b>Other Statutes</b><br><input type="checkbox"/> 891 Agricultural Acts<br><input type="checkbox"/> 893 Environmental Matters<br><input type="checkbox"/> 890 Other Statutory Actions (If Administrative Agency is Involved)             | <input type="radio"/> <b>D. Temporary Restraining Order/Preliminary Injunction</b><br><br>Any nature of suit from any category may be selected for this category of case assignment.<br><br>*(If Antitrust, then A governs)*                                                                                                                                                                                                                                                                  |
| <input type="radio"/> <b>E. General Civil (Other)</b> OR <input type="radio"/> <b>F. Pro Se General Civil</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |
| <b>Real Property</b><br><input type="checkbox"/> 210 Land Condemnation<br><input type="checkbox"/> 220 Foreclosure<br><input type="checkbox"/> 230 Rent, Lease & Ejectment<br><input type="checkbox"/> 240 Torts to Land<br><input type="checkbox"/> 245 Tort Product Liability<br><input type="checkbox"/> 290 All Other Real Property<br><br><b>Personal Property</b><br><input type="checkbox"/> 370 Other Fraud<br><input type="checkbox"/> 371 Truth in Lending<br><input type="checkbox"/> 380 Other Personal Property Damage<br><input type="checkbox"/> 385 Property Damage Product Liability | <b>Bankruptcy</b><br><input type="checkbox"/> 422 Appeal 27 USC 158<br><input type="checkbox"/> 423 Withdrawal 28 USC 157<br><br><b>Prisoner Petitions</b><br><input type="checkbox"/> 535 Death Penalty<br><input type="checkbox"/> 540 Mandamus & Other<br><input type="checkbox"/> 550 Civil Rights<br><input type="checkbox"/> 555 Prison Conditions<br><input type="checkbox"/> 560 Civil Detainee – Conditions of Confinement<br><br><b>Property Rights</b><br><input type="checkbox"/> 820 Copyrights<br><input type="checkbox"/> 830 Patent<br><input type="checkbox"/> 840 Trademark<br><br><b>Federal Tax Suits</b><br><input type="checkbox"/> 870 Taxes (US plaintiff or defendant)<br><input type="checkbox"/> 871 IRS-Third Party 26 USC 7609                                                                | <b>Forfeiture/Penalty</b><br><input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881<br><input type="checkbox"/> 690 Other<br><br><b>Other Statutes</b><br><input type="checkbox"/> 375 False Claims Act<br><input type="checkbox"/> 400 State Reapportionment<br><input type="checkbox"/> 430 Banks & Banking<br><input type="checkbox"/> 450 Commerce/ICC Rates/etc.<br><input type="checkbox"/> 460 Deportation<br><input type="checkbox"/> 462 Naturalization Application<br><input type="checkbox"/> 465 Other Immigration Actions<br><input type="checkbox"/> 470 Racketeer Influenced & Corrupt Organization | <input type="checkbox"/> 480 Consumer Credit<br><input type="checkbox"/> 490 Cable/Satellite TV<br><input type="checkbox"/> 850 Securities/Commodities/Exchange<br><input type="checkbox"/> 896 Arbitration<br><input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision<br><input type="checkbox"/> 950 Constitutionality of State Statutes<br><input type="checkbox"/> 890 Other Statutory Actions (if not administrative agency review or Privacy Act) |

|                                                                                                                                                                                                                                                                                                                                                                                                                    |                                                                                                                                                                                                                                                                                                                                                                                                                                      |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |                                                                                                                                          |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------|
| <input type="radio"/> <b>G. Habeas Corpus/ 2255</b><br><br><input type="checkbox"/> 530 Habeas Corpus – General<br><input type="checkbox"/> 510 Motion/Vacate Sentence<br><input type="checkbox"/> 463 Habeas Corpus – Alien Detainee                                                                                                                                                                              | <input type="radio"/> <b>H. Employment Discrimination</b><br><br><input type="checkbox"/> 442 Civil Rights – Employment (criteria: race, gender/sex, national origin, discrimination, disability, age, religion, retaliation)<br><br><i>*(If pro se, select this deck)*</i>                                                                                                                                                          | <input type="radio"/> <b>I. FOIA/Privacy Act</b><br><br><input checked="" type="checkbox"/> 895 Freedom of Information Act<br><input type="checkbox"/> 890 Other Statutory Actions (if Privacy Act)<br><br><i>*(If pro se, select this deck)*</i>                                                                                                                                                                                                                                                                                                                                                       | <input type="radio"/> <b>J. Student Loan</b><br><br><input type="checkbox"/> 152 Recovery of Defaulted Student Loan (excluding veterans) |
| <input type="radio"/> <b>K. Labor/ERISA (non-employment)</b><br><br><input type="checkbox"/> 710 Fair Labor Standards Act<br><input type="checkbox"/> 720 Labor/Mgmt. Relations<br><input type="checkbox"/> 740 Labor Railway Act<br><input type="checkbox"/> 751 Family and Medical Leave Act<br><input type="checkbox"/> 790 Other Labor Litigation<br><input type="checkbox"/> 791 Empl. Ret. Inc. Security Act | <input type="radio"/> <b>L. Other Civil Rights (non-employment)</b><br><br><input type="checkbox"/> 441 Voting (if not Voting Rights Act)<br><input type="checkbox"/> 443 Housing/Accommodations<br><input type="checkbox"/> 440 Other Civil Rights<br><input type="checkbox"/> 445 Americans w/Disabilities – Employment<br><input type="checkbox"/> 446 Americans w/Disabilities – Other<br><input type="checkbox"/> 448 Education | <input type="radio"/> <b>M. Contract</b><br><br><input type="checkbox"/> 110 Insurance<br><input type="checkbox"/> 120 Marine<br><input type="checkbox"/> 130 Miller Act<br><input type="checkbox"/> 140 Negotiable Instrument<br><input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment<br><input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits<br><input type="checkbox"/> 160 Stockholder's Suits<br><input type="checkbox"/> 190 Other Contracts<br><input type="checkbox"/> 195 Contract Product Liability<br><input type="checkbox"/> 196 Franchise | <input type="radio"/> <b>N. Three-Judge Court</b><br><br><input type="checkbox"/> 441 Civil Rights – Voting (if Voting Rights Act)       |

**V. ORIGIN**  
☒ 1 Original Proceeding  
 ☐ 2 Remand from State Court  
 ☐ 3 Remanded from Appellate Court  
 ☐ 4 Reinstated or Reopened  
 ☐ 5 Transferred from another district (specify)  
 ☐ 6 Multi-district Litigation  
 ☐ 7 Appeal to District Judge from Mag. Judge

**VI. CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE.)**  
 5 U.S.C. § 552 (refusal to comply with Freedom of Information Act request)

|                                     |                                                                            |                                                                     |                                                                                  |
|-------------------------------------|----------------------------------------------------------------------------|---------------------------------------------------------------------|----------------------------------------------------------------------------------|
| <b>VII. REQUESTED IN COMPLAINT</b>  | CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 <input type="checkbox"/> | DEMAND \$ _____                                                     | JURY DEMAND: YES <input type="checkbox"/> NO <input checked="" type="checkbox"/> |
| <b>VIII. RELATED CASE(S) IF ANY</b> | (See instruction)                                                          | YES <input type="checkbox"/> NO <input checked="" type="checkbox"/> | If yes, please complete related case form                                        |

|                 |                                                    |
|-----------------|----------------------------------------------------|
| DATE: 5/29/2013 | SIGNATURE OF ATTORNEY OF RECORD: <i>Lynn Baker</i> |
|-----------------|----------------------------------------------------|

**INSTRUCTIONS FOR COMPLETING CIVIL COVER SHEET JS-44**  
 Authority for Civil Cover Sheet

The JS-44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and services of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. Listed below are tips for completing the civil cover sheet. These tips coincide with the Roman Numerals on the cover sheet.

- I.** COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF/DEFENDANT (b) County of residence: Use 11001 to indicate plaintiff if resident of Washington, DC, 88888 if plaintiff is resident of United States but not Washington, DC, and 99999 if plaintiff is outside the United States.
- III.** CITIZENSHIP OF PRINCIPAL PARTIES: This section is completed only if diversity of citizenship was selected as the Basis of Jurisdiction under Section II.
- IV.** CASE ASSIGNMENT AND NATURE OF SUIT: The assignment of a judge to your case will depend on the category you select that best represents the primary cause of action found in your complaint. You may select only one category. You must also select one corresponding nature of suit found under the category of the case.
- VI.** CAUSE OF ACTION: Cite the U.S. Civil Statute under which you are filing and write a brief statement of the primary cause.
- VIII.** RELATED CASE(S), IF ANY: If you indicated that there is a related case, you must complete a related case form, which may be obtained from the Clerk's Office.

Because of the need for accurate and complete information, you should ensure the accuracy of the information provided prior to signing the form.

---

---

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

COMPETITIVE ENTERPRISE INSTITUTE

*Plaintiff*

v.

United States Environmental Protection Agency

*Defendant*

)  
)  
)  
)  
)  
)  
)

Civil Action No. 13-779

**SUMMONS IN A CIVIL ACTION**

To: *(Defendant's name and address)*

U.S. Attorney for the District of Columbia  
Attn: Civil Process Clerk.  
501 3rd Street, NW, 4th Floor  
Washington, D.C. 20530

A lawsuit has been filed against you.

Within 30 days after service of this summons on you (not counting the day you received it) you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Christopher C. Horner & Hans Bader  
Competitive Enterprise Institute  
1899 L Street, NW, 12th Floor  
Washington, D.C. 20036

If you fail to respond, judgment by default may be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

*ANGELA D. CAESAR, CLERK OF COURT*

Date: \_\_\_\_\_

\_\_\_\_\_  
*Signature of Clerk or Deputy Clerk*

Civil Action No. 13-779

**PROOF OF SERVICE***(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))*

This summons for *(name of individual and title if any)* \_\_\_\_\_  
 was received by me on *(date)* \_\_\_\_\_.

☐ I personally served the summons on the individual at *(place)* \_\_\_\_\_  
 \_\_\_\_\_ on *(date)* \_\_\_\_\_; or

☐ I left the summons at the individual's residence or usual place of abode with *(name)* \_\_\_\_\_  
 \_\_\_\_\_, a person of suitable age and discretion who resides there,  
 on *(date)* \_\_\_\_\_, and mailed a copy to the individual's last known address; or

☐ I served the summons on *(name of individual)* \_\_\_\_\_, who is  
 designated by law to accept service of process on behalf of *(name of organization)* \_\_\_\_\_  
 \_\_\_\_\_ on *(date)* \_\_\_\_\_; or

☐ I returned the summons unexecuted because \_\_\_\_\_; or

☐ Other *(specify)*: \_\_\_\_\_.

My fees are \$ \_\_\_\_\_ for travel and \$ \_\_\_\_\_ for services, for a total of \$ \_\_\_\_\_ 0.00.

I declare under penalty of perjury that this information is true.

Date: \_\_\_\_\_

\_\_\_\_\_  
*Server's signature*

\_\_\_\_\_  
*Printed name and title*

\_\_\_\_\_  
*Server's address*

Additional information regarding attempted service, etc:

---

---

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

COMPETITIVE ENTERPRISE INSTITUTE

*Plaintiff*

v.

United States Environmental Protection Agency

*Defendant*

)  
)  
)  
)  
)  
)  
)

Civil Action No. 13-779

**SUMMONS IN A CIVIL ACTION**

To: *(Defendant's name and address)*

United States Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Ariel Rios Building  
Washington, D.C. 20460

A lawsuit has been filed against you.

Within 30 days after service of this summons on you (not counting the day you received it) you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Christopher C. Horner & Hans Bader  
Competitive Enterprise Institute  
1899 L Street, NW, 12th Floor  
Washington, D.C. 20036

If you fail to respond, judgment by default may be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

*ANGELA D. CAESAR, CLERK OF COURT*

Date: \_\_\_\_\_

\_\_\_\_\_  
*Signature of Clerk or Deputy Clerk*

Civil Action No. 13-779

**PROOF OF SERVICE***(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))*

This summons for *(name of individual and title if any)* \_\_\_\_\_  
 was received by me on *(date)* \_\_\_\_\_.

☐ I personally served the summons on the individual at *(place)* \_\_\_\_\_  
 \_\_\_\_\_ on *(date)* \_\_\_\_\_; or

☐ I left the summons at the individual's residence or usual place of abode with *(name)* \_\_\_\_\_  
 \_\_\_\_\_, a person of suitable age and discretion who resides there,  
 on *(date)* \_\_\_\_\_, and mailed a copy to the individual's last known address; or

☐ I served the summons on *(name of individual)* \_\_\_\_\_, who is  
 designated by law to accept service of process on behalf of *(name of organization)* \_\_\_\_\_  
 \_\_\_\_\_ on *(date)* \_\_\_\_\_; or

☐ I returned the summons unexecuted because \_\_\_\_\_; or

☐ Other *(specify)*: \_\_\_\_\_.

My fees are \$ \_\_\_\_\_ for travel and \$ \_\_\_\_\_ for services, for a total of \$ \_\_\_\_\_ 0.00.

I declare under penalty of perjury that this information is true.

Date: \_\_\_\_\_

\_\_\_\_\_  
*Server's signature*

\_\_\_\_\_  
*Printed name and title*

\_\_\_\_\_  
*Server's address*

Additional information regarding attempted service, etc:



---

---

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

COMPETITIVE ENTERPRISE INSTITUTE

*Plaintiff*

v.

United States Environmental Protection Agency

*Defendant*

)  
)  
)  
)  
)  
)  
)

Civil Action No. 13-779

**SUMMONS IN A CIVIL ACTION**

To: *(Defendant's name and address)*

Attorney General Eric Holder  
950 Pennsylvania Ave., NW, Room 511  
Washington, D.C. 20530

A lawsuit has been filed against you.

Within 30 days after service of this summons on you (not counting the day you received it) you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Christopher C. Horner & Hans Bader  
Competitive Enterprise Institute  
1899 L Street, NW, 12th Floor  
Washington, D.C. 20036

If you fail to respond, judgment by default may be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

*ANGELA D. CAESAR, CLERK OF COURT*

Date: \_\_\_\_\_

\_\_\_\_\_  
*Signature of Clerk or Deputy Clerk*

Civil Action No. 13-779

**PROOF OF SERVICE***(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))*

This summons for *(name of individual and title if any)* \_\_\_\_\_  
 was received by me on *(date)* \_\_\_\_\_.

☐ I personally served the summons on the individual at *(place)* \_\_\_\_\_  
 \_\_\_\_\_ on *(date)* \_\_\_\_\_; or

☐ I left the summons at the individual's residence or usual place of abode with *(name)* \_\_\_\_\_  
 \_\_\_\_\_, a person of suitable age and discretion who resides there,  
 on *(date)* \_\_\_\_\_, and mailed a copy to the individual's last known address; or

☐ I served the summons on *(name of individual)* \_\_\_\_\_, who is  
 designated by law to accept service of process on behalf of *(name of organization)* \_\_\_\_\_  
 \_\_\_\_\_ on *(date)* \_\_\_\_\_; or

☐ I returned the summons unexecuted because \_\_\_\_\_; or

☐ Other *(specify)*: \_\_\_\_\_.

My fees are \$ \_\_\_\_\_ for travel and \$ \_\_\_\_\_ for services, for a total of \$ \_\_\_\_\_ 0.00.

I declare under penalty of perjury that this information is true.

Date: \_\_\_\_\_

\_\_\_\_\_  
*Server's signature*

\_\_\_\_\_  
*Printed name and title*

\_\_\_\_\_  
*Server's address*

Additional information regarding attempted service, etc:

**From:** [Garbow, Avi](#)  
**To:** [Minoli, Kevin](#)  
**Subject:** FW: Text response  
**Date:** Friday, May 31, 2013 3:33:20 PM

---

fyi

Avi Garbow  
Deputy General Counsel  
U.S. Environmental Protection Agency  
(202) 564-1917 Cell (b) (6)

-----Original Message-----

From: Mccarthy, Gina  
Sent: Friday, May 31, 2013 3:31 PM  
To: Ketcham-Colwill, Nancy; Goffman, Joseph  
Cc: Garbow, Avi; Reynolds, Thomas; Millett, John; Ganesan, Arvin  
Subject: Text response

(b) (5) DPP, (b) (5) ACP

[REDACTED]

[REDACTED]

[REDACTED]

**From:** [Minoli, Kevin](#)  
**To:** [Garbow, Avi](#)  
**Cc:** [McDermott, Marna](#); [Anderson, Cindy](#)  
**Subject:** Fw: release to CEI Friday, Dec. 6, of text message billing detail  
**Date:** Wednesday, December 04, 2013 4:39:46 PM  
**Attachments:** [12.3.13 names REDACTED Redacted -sample page 17.pdf](#)  
[draft CEI Release \(12.6.13\) cover ltr 12.4cha.docx](#)  
**Importance:** High

---

(b) (5) DPP

Hi Avi: (b) (5) DPP, (b) (5) ACP

. Kevin

Kevin S. Minoli  
Acting Principal Associate General Counsel  
Office of General Counsel  
Main Line: 564-8064  
Direct Dial: 564-5551

---

**From:** Anderson, Cindy  
**Sent:** Wednesday, December 04, 2013 4:37:19 PM  
**To:** Kika, Stacy; Johnson, Alisha; Reynolds, Thomas  
**Cc:** Minoli, Kevin  
**Subject:** release to CEI Friday, Dec. 6, of text message billing detail

Tom, et al.

Kevin Minoli suggested that I send this para. to you this evening as advance notice of a document to be produced this Friday to Competitive Enterprise Institute, Chris Horner.

The two attachments are draft versions of the documents that I will be sending to Horner Friday afternoon, Dec. 6.

They are a cover letter and a pdf spreadsheet of bills for text messaging for 7 months use by Gina McCarthy. I will send the final versions of these 2 documents to you later tomorrow before they are emailed to Horner/CEI.

“On July 15, 2013, the Competitive Enterprise Institute (CEI) filed a complaint in the District of Columbia under the Freedom of Information Act (FOIA). The complaint relates to its FOIA request for billing invoices for the text message use by Gina McCarthy on her EPA-issued mobile device over a period of three years (July 2009 – June 2012).

On July 26 EPA responded with information providing the aggregate number of text messages for the period of time available from the Agency’s billing office.

On Friday, December 6, the Agency provided to CEI the spreadsheet of more detailed billing information that was located by the Office of Technology Operations and Planning. Individual phone numbers were removed for personal privacy.

EPA continues to work with the Department of Justice to respond to CEI’s complaint.”

Please let me know if you would like to have more detailed information about this matter before Friday, 12/6.

Cindy Anderson  
EPA/OGC  
(202) 564-2690

**From:** [Miller, Kevin](#)  
**To:** [OGC FRONT OFFICE](#)  
**Subject:** GLO Bi-Weekly Agenda  
**Date:** Tuesday, November 05, 2013 4:24:38 PM  
**Attachments:** [GLO reg review template 110513.docx](#)

---

(b) (5) DPP

Kevin Miller | US EPA | Office of General Counsel | 1200 Pennsylvania Ave., NW | WJC North, Mail Code 2377A | Washington DC 20460 | phone: (202) 564-2691

**From:** [Miller, Kevin](#)  
**To:** [OGC FRONT OFFICE](#)  
**Subject:** GLO bi weekly agenda -- 11/20/13  
**Date:** Tuesday, November 19, 2013 3:13:45 PM  
**Attachments:** [GLO reg review 11-20-13 ILPG.docx](#) (b) (5) DPP

---

Kevin Miller | US EPA | Office of General Counsel | 1200 Pennsylvania Ave., NW | WJC North, Mail Code 2377A | Washington DC 20460 | phone: (202) 564-2691

**From:** [Miller, Kevin](#)  
**To:** [OGC FRONT OFFICE](#)  
**Subject:** GLO bi-weekly agenda  
**Date:** Tuesday, September 24, 2013 5:45:19 PM  
**Attachments:** [GLO reg review template \(3\) \(3\) \(3\) \(4\).docx](#)

---

(b) (5) DPP

Kevin Miller | US EPA | Office of General Counsel | 1200 Pennsylvania Ave., NW | WJC North, Mail Code 2377A | Washington DC 20460 | phone: (202) 564-2691